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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~382~~ 119

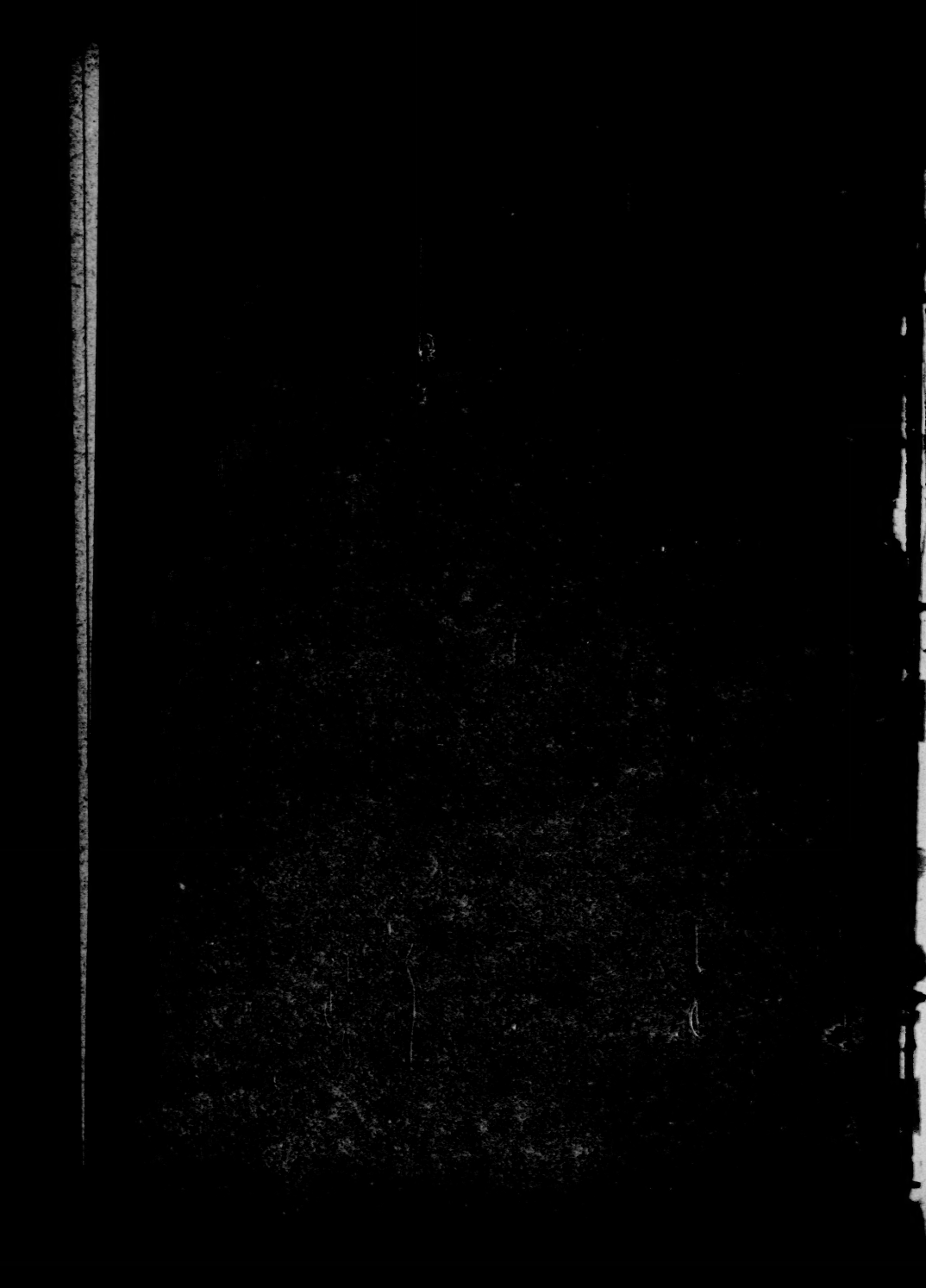
SARAH A. PENNOCK, A. L. NICCOLLS, C. M. NICCOLLS, J. F. CHAMBERLAIN, AND W. E. HAXTON, PLAINTIFFS IN ERROR,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF FRANKLIN COUNTY, GEORGE D. STINEBAUGH, CLERK, AND MILO R. HARRIS, TREASURER, OF FRANKLIN COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JANUARY 17, 1878.



SUPREME COURT OF THE UNITED STATES.

No. 382.

SARAH A. PENNOCK, A. L. NICCOLLS, C. M. NICCOLLS, J. F. CHAMBERLAIN, AND W. E. HAXTON, PLAINTIFFS IN ERROR,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF FRANKLIN COUNTY, GEORGE D. STINEBAUGH, CLERK, AND MILO R. HARRIS, TREASURER, OF FRANKLIN COUNTY.

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1 The President of the United States to the honorable the judges of the supreme court of the State of Kansas, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of said State in which a decision in the suit could be had, between the board of county commissioners of Franklin County, in said State George D. Stinebaugh, clerk, and Milo R. Harris, treasurer of Franklin County, plaintiffs in error, and Sarah A. Pennock, A. L. Niccolls, C. M. Nicholls, J. F. Chamberlain, and W. E. Haxton, defendants in error, wherein a right, privilege, and immunity was claimed under a treaty of the United States, and the decision was against the right, privilege, and immunity specially set up or claimed under such treaty, a manifest error hath happened, to the great damage of the said Sarah A. Pennock, A. L. Niccolls, C. M. Niccolls, J. F. Chamberlain, and W. E. Haxton, as by their complaint appears: We being willing that the error, if any hath been, should be duly cor-
2 rected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 31st day of December, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.]

A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

3 Allowed.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of Kansas.

4 The United States to the Board of County Commissioners of Franklin County, George D. Stinebaugh, clerk, and Milo R. Harris, treasurer of Franklin County, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the States of Kansas, wherein Sarah A. Pennock, A. L. Niccolls, C. M. Niccolls, J. F. Chamberlain, and W. E. Haxton, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in the writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Albert H. Horton, chief justice of the supreme court of the State of Kansas, this 31st day of December, in the year of our Lord one thousand eight hundred and seventy-seven.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

5 OTTAWA, KANSAS, *Jan'y 4th*, 1878.

I hereby accept service of the within citation, and enter appearance in the cause therein referred to, for all the defendants in error therein named.

HENRY B. HUGHBANKS,
County Att'y, of Franklin County, Kansas.

6 Supreme court, State of Kansas, ss.

Be it remembered that on the 7th day of February, A. D. 1877, the board of county commissioners of Franklin County, Geo. D. Stinebaugh, clerk, Milo R. Harris, treasurer of Franklin County, filed in the office of the clerk of the supreme court their petition in error, together with the transcript of the record of the judgment of the district court of Franklin County, Kansas, which petition in error is in words and figures as follows, to wit:

Petition.

In the supreme court, State of Kansas. Error to the district court of Franklin County.

THE BOARD OF COUNTY COMMISSIONERS OF Franklin County, Geo. D. Stinebaugh, clerk, Milo R. Harris, treasurer of Franklin County, plaintiffs in error,
vs.
SARAH A. PENNOCK, A. L. NICCOLLS, C. M. Niccolls, J. T. Chamberlain, W. E. Haxton, defendants in error.

The plaintiffs say that at the November term, 1875, of the district court of Franklin County, in an action therein pending, wherein Sarah A. Pennock was plaintiff, and these plaintiffs and A. L. Niccolls, C. M. Niccolls, J. T. Chamberlain, and W. E. Haxton were defendants, the said Sarah A. Pennock recovered a judgment against said defendants below, perpetually enjoining the collection of certain taxes theretofore levied by the officers of said county on certain real estate particularly described in pages 21 and 22 of the case made, hereto attached and made part of this petition, and enjoining the issuance by said Geo. D. Stinebaugh of certain tax deeds upon the lands aforesaid, and decreeing and holding for naught certain tax sales theretofore made by the officers of said county of said lands to said A. L. Niccolls, C. M. Niccolls, J. T. Chamberlain, and W. E. Haxton, as more fully appears from the record of said judgment at pages 21 and 22 of said case made. The pleadings, proceedings, judgments, and orders of said court in said cause had and made fully to appear in the annexed case made. The plaintiffs allege that said A. L. Niccolls, C. M. Niccolls, J. T. Chamberlain, W. E. Haxten, and each of them, refuse to join in this petition in error as plaintiffs. The plaintiff alleges that there is manifest error in said proceedings and judgment.

First. The court erred in giving judgment in favor of the plaintiff below and against the defendants below, when it ought to have been given in favor of the defendants below, according to the law of the land.

Second. The facts set forth in plaintiffs' petition below are not s ffi-

cient to maintain in law the aforesaid action thereof against the defendants below.

Third. The court erred in overruling the motion of the defendants below for a new trial.

Wherefore, the plaintiffs pray that said judgment may be reversed and vacated, and that judgment may be rendered here upon the facts in favor of the plaintiffs, dissolving the said injunction, and for other relief.

H. C. MECHEM,
Attorney for Pl'ffs in Error.

7 Which petition in error is endorsed, to wit:

STATE OF KANSAS,
Franklin County:

I hereby waive issue and service of summons in this case and appear for Sarah A. Pennock, defendant in error, this day of February, 1877.

JNO. W. DEFORD,
Attorney for S. A. Pennock.

STATE OF KANSAS,
Franklin County:

We hereby waive issue and service of summons and appear for J. T. Chamberlain and W. E. Haxten, defendants in error, this 2nd day of February, 1877.

BENSON & PARKINSON,
Att'ys for J. T. Chamberlain and W. E. Haxten.

STATE OF KANSAS,
Franklin County:

I hereby waive the issue and service of summons in this case and appear for A. L. Niccolls and C. M. Niccolls, defendants in error, this 3rd day of February, 1877.

H. B. HUGHBANKS,
Att'y for Niccolls & Niccolls.

8 STATE OF KANSAS,
Supreme Court, ss:

The State of Kansas to the sheriff of Franklin County, greeting:

You are hereby commanded to notify A. L. Niccolls & C. M. Niccolls, defendants in error, that the board of co. com'rs of Franklin Co., Ks'a, et als., plaintiffs in error, did, on the 7th day of February, A. D. 1877, file, in the clerk's office of the supreme court of Kansas, a petition in error and transcript of record, the object of which is to obtain the reversal of a certain judgment rendered by the district court, sitting within and for the county of Franklin, and State of Kansas, in an action pending before said court, wherein Sarah A. Pennock, in error, was plaintiff, and the said board of co. com'rs, and A. L. Niccolls & C. M. Niccolls, and others, in error, were defendants.

You will make due return of this summons in error on or before the 28th day of February, A. D. 1877.

Witness my hand and official seal affixed hereto, at my office in Topeka, this 7th day of February, A. D. 1877.

{ SEAL SUP. COURT OF KANSAS. }

A. HAMMATT,
Clerk Supreme Court.

(Indorsed:) No. 1100. Supreme court, State of Kansas. Franklin Co. vs. Niccolls. Summons in error. Issued Feb'y 7, 1877. Ret'ble Feb'y 28, 1877. Mechum, attorney for plaintiff.

STATE OF KANSAS,
Franklin County, ss:

I received this summons in error on the 21st day of February, 1877, at 6 o'clock p. m., and served the same on the 21st day of Feb'ry, 1877, by delivering certified copy of the within with all the endorsements thereon to the within-named defendant, A. L. Niccolls; the within-named C. M. Niccolls not found within my county.

W. O. PICKRELL,
Sheriff,

By ——— ———,
Deputy.

Fees: Service, 50; mileage, ; copy, 25—75.

9 TRANSCRIPT.

Be it remembered that on the eighth day of May, A. D. 1875, Sarah A. Pennock filed in the office of the clerk of the district court in and for the county of Franklin, State of Kansas, her petition against the county commissioners of the county of Franklin, Geo. B. Stinebaugh as county clerk of the county of Franklin, State of Kansas, A. L. Niccolls, C. M. Niccolls, W. E. Haxton, J. T. Chamberlain, and Milo R. Harris, as treasurer of Franklin County, which petition is in words following, to wit:

Petition.

In district court in and for Franklin County, State of Kansas.

SARAH A. PENNOCK, PLAINTIFF,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the county of Franklin, George D. Stinebaugh, as county clerk of the county of Franklin, State of Kansas, A. L. Niccolls, C. M. Niccolls, W. E. Haxton, J. T. Chamberlain, and Milo R. Harris, as county treasurer of Franklin county, defendants. } No. 1729.

The said Sarah A. Pennock, plaintiff, says:

1st. That she is an Indian and a member by blood, birth, and descent of the confederate tribes of Sacs and Foxes of the Mississippi. That she intermarried with one Wm. Whistler, a member by birth of the same tribes, and who dying, she afterwards married one Henry Pennock, a citizen of the United States, whose wife she now is, although she is still a member of said tribe, and has so remained since her birth.

2nd. By virtue of article 10 of the treaty ratified and proclaimed July 9th, 1860, between the United States and the tribe above named, there was assigned to the plaintiff, as one of the mixed-bloods therein referred to, all that tract of land situate in the county aforesaid, and described as follows, to wit: The southwest quarter of the southwest quarter of section thirty-five, township sixteen, of range eighteen;
10 the west half of the northwest quarter and the northwest

quarter of the southwest quarter of section two, township seventeen, range eighteen; and the location and allotment of said land were so made to her out of that portion of the "reserve" of said tribes relinquished by that treaty to the United States in trust for the uses and purposes therein set forth. And the following lands by virtue of article 10 of the said treaty, ratified and proclaimed July 9th, 1860, between the United States and the tribes above named, were assigned to the following parties as of the "mixed-bloods" above referred , to wit, in Franklin County, Kansas:

Susan J. Goodell, E. 1-2 section 3, tp. 17, rg. 18.
Kish-kah-swah, S. 1-2 section 16, tp. 17, rg. 18.
Jane Goodell, NE. 1-4 section 10, tp. 17, rg. 18.
Jane Goodell, NW. 1-4 of NW. 1-4 section 10, tp. 17, rg. 18.
Jane Goodell, E. 1-2 NW. 1-4 section 10, tp. 17, rg. 18.
Jane Goodell, NW. 1-2 NW. 1-4 section 11, tp. 17, rg. 18.

All of which said lands, allotted as aforesaid, were sold and duly conveyed in fee-simple, by the said allottees, to the said plaintiff herein, Sarah A. Pennock, between May 7th, 1867, and May 30th, 1868. Afterwards, by virtue of the amended 17th article of the treaty proclaimed October 14th, 1868, between the United States and the tribes aforementioned, a patent in fee-simple duly issued to the plaintiff for the foregoing described lands allotted to her, and patents were likewise issued to the allottees herein named, for the lands allotted to them, and which the plaintiff herein purchased of them, said patents being dated December 17th, 1870, and now shown to the court here by copies thereof herewith filed and marked Exhibits A, B, C, & D.

3rd. And this complainant further shows to the court here that in the year 1871, and not before, the defendants, The Board of County Commissioners of the county of Franklin, and the said George D. Stinebaugh, as county clerk of said county, or one of them, caused the said lands aforesaid to be listed, valued, and assessed for taxation, and the taxes and charges so assessed thereupon not having been paid, the county treasurer of said county did on the 7th day of May, 1872, sell for the said taxes and charges thereon, to wit, $101.48, the southwest quarter of the southwest quarter of section thirty-five, tp. 16, range 18; the northeast quarter of section three, tp. 17, range 18; the southeast quarter of section three, tp. 17, range 18; the southwest quarter section sixteen, tp. 17, range 18; the northwest quarter of the northwest quarter of section 10, tp. 17, range 18; the east half of the northwest quarter of section 10, tp. 17, range 18, above described, to one A. L. Niccolls who has since transferred the certificates of said sale to one of the defendants herein, to wit, C. M. Niccolls, who now holds and owns the same; and at the same time said treasurer did likewise sell for the said taxes and charges thereon, to wit, $39.39, the southeast quarter of section 16, tp. 17, r. 18, and the northeast quarter of section 10, tp. 17, r. 18, above described to one J. T. Chamberlain, one of the defendants, who now owns and holds the certificate of such sale to him; and at the same time said treasurer did likewise sell for the said taxes and charges thereon, to wit, $14.85, the west half of the northwest quarter of section 2, tp. 17, range 18, of the said described lands, to one W. E. Haxton, who now owns and holds the said certificate of such sale to him.

4th. And the defendant, George D. Stinebaugh, as county clerk of Franklin County, where said lands were so sold as aforesaid, threatens to and will unless restrained by the injunction of this court on presentation to him of such certificates of sale, or any of them, execute and de-
11 liver to the purchasers, their heirs and assigns, so presenting to him

such certificates or any of them, at any time after the 7th of May, 1875, a deed of said lands or any part thereof, described in such certificates then remaining unredeemed, and the defendants C. M. Niccolls, J. T. Chamberlain, and W. E. Haxton threaten to and will unless restrained by order of this court, immediately after the 7th of May, 1875, present the said several certificates of sale so held and owned by them, respectively, to the said Stinebaugh, and thereupon demand such deeds.

5th. Yet all and singular said taxes and charges upon said lands, and said sales thereof, were and are wholly illegal, as all and every the said defendants well knew, at and prior to all the times hereinbefore mentioned.

Wherefore the said plaintiff prays that said Geo. D. Stinebaugh, as such county clerk, and his servants, agents, deputies, and successors in office, may be restrained by the temporary injunction of this court from executing or delivering a tax deed or deeds of said lands or any part thereof to said C. M. Niccolls, J. T. Chamberlain, W. E. Haxton, and A. L. Niccolls, or their or either of their agents, attorneys, or assigns, during the pendency of this action, and that upon the final hearing hereof said injunction may be made perpetual, and that all and singular said tax sales of said lands may be adjudged and decreed to have been illegal and void and may be set aside and held for naught, and that she may have such other and further legal or equitable relief in the premises as may be just, and may recover her costs of suit.

JOHN W. DEFORD, A. FRANKLIN,
Att'ys for Plaintiff.

Copy of Exhibit A mentioned in plaintiff's petition and made a part thereof.

The United States of America to all to whom these presents shall come, greeting:

Whereas in the amended 17th article of the treaty between commissioners on the part of the United States and certain chiefs on the part of the tribe of Sac and Fox Indians of the Mississippi, on the part of said Indians, concluded February 18th, 1867, it is stipulated "that the half-breeds and full-bloods of the tribe, who were entitled to selections of land under the Sac and Fox treaty ratified July ninth, one thousand eight hundred and sixty, and which selections have been approved by the Secretary of the Interior, shall be entitled to patents in fee-simple for the lands heretofore selected according to the schedule annexed to this treaty: Provided, That where such selections have been made and the allottees have sold their lands for a valuable consideration, not less than one dollar and twenty-five cents per acre, the Secretary of the Interior shall upon full proof being made cause patents to issue to the purchasers or their assigns";

And whereas there has been deposited in the General Land Office an order bearing date January 28th, 1869, from the Secretary of the Interior, and a subsequent order dated August 23, 1870, accompanied by a "Schedule of all allotments to certain half and full bloods of Sac and Fox of the Mississippi tribe of Indians," "for which patents are to issue in accordance with the amended 17th article of the treaty" aforesaid with the said Indians, upon which schedule Sarah A. Whistler is designated as the allottee for the southwest quarter of the southwest quarter of section thirty-five, township sixteen, range eighteen; the west half of the northwest quarter, and the northwest quarter of the southwest quarter of section two, township seventeen, of range eighteen,

in the State of Kansas, containing one hundred and sixty acres
12 according to the official plat of survey returned to the General Land Office by the surveyor-general, and Sarah A. Whistler is designated in said schedule as the person to whom patent is to be issued:

Now know ye that the United States of America, in consideration of the premises, and in conformity with the said treaty, the "schedule" and "orders" aforesaid, have given and granted, and by these presents do give and grant, unto the said Sarah A. Whistler, and to her heirs, the tract of land above described, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Sarah A. Whistler and to her heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington this seventeenth day of December, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninety-fifth.

By the president.

U. S. GRANT,
[SEAL.] By J. PARRISH,
Secretary.

J. F. STOCK,
Acting Recorder of the General Land Office, ad interim.

Exhibit B, filed with and made a part of plaintiff's petition.

The United States of America to all to whom these presents shall come, greeting:

Whereas in the amended seventeenth article of the treaty between commissioners on the part of the United States and certain chiefs of the tribe of Sac and Fox Indians of the Mississippi, on the part of said Indians, concluded February 18th, 1867, it is stipulated "that the half-breeds and full-bloods of the tribe who were entitled to selections of land under the Sac and Fox treaty, ratified July 9th, one thousand eight hundred and sixty, and which selections have been approved by the Secretary of the Interior, shall be entitled to patents in fee simple for the lands heretofore selected according to the schedule annexed to this treaty: Provided, That where such selections have been made and the allottees have sold their lands for a valuable consideration, not less than one dollar and twenty-five cents per acre, the Secretary of the Interior shall, upon full proof being made, cause patents to issue to the purchasers or their assigns";

And whereas there has been deposited in the General Land Office an order bearing date January 28th, 1869, from the Secretary of the Interior, accompanied by a "schedule of allotments to certain half-breeds and full-bloods of the Sac and Fox of the Mississippi tribe of Indians," for which patents are to issue in accordance with the terms of the amended 17th article of the treaty aforesaid with the said Indians, upon which schedule Susan J. Goodell is designated as the allottee for the east half of section three, in township seventeen south, of range eighteen east, in the State of Kansas, containing three hundred and twenty-four acres and fifty-eight-hundredths of an acre, according to the official plat of survey returned to the General Land Office by the surveyor gen-

eral, and Susan J. Goodell is designated in said schedule as the person to whom patent is to be issued:

Now know ye that the United States of America, in consideration of the premises, and in conformity with said treaty, the "schedule" and "orders" aforesaid, have given and granted, and by these presents do give and grant, unto the said Susan J. Goodell, and to her heirs, the tract of land above described, to have and to hold the same together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Susan J. Goodell and to her heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington this seventeenth day of December, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninety-fifth.

By the President.

U. S. GRANT,
By J. PARRISH,
Secretary.

J. F. STOCK,
Acting Recorder of the General Land Office, ad interim.

Recorded vol. 13, pages 188 & 189.

Exhibit C, described in and made a part of this petition.

The United States of America to all to whom these presents shall come, greeting:

Whereas in the amended seventh article of the treaty between commissioners on the part of the United States, and certain chiefs of the tribe of Sac and Fox Indians of the Mississippi, on the part of the Indians, concluded February 18th, 1867, it is stipulated "that the half-breeds and full-bloods of the tribe who were entitled to selections of land under the Sac and Fox treaty ratified July ninth, one thousand eight hundred and sixty, and which selections have been approved by the Secretary of the Interior, shall be entitled to patents in fee simple for the lands heretofore selected according to the schedule annexed to this treaty: Provided, That where such selections have been made and the allottees have sold their lands for a valuable consideration, not less than one dollar and twenty-five cents per acre, the Secretary of the Interior shall, upon full proof being made, cause patents to issue to the purchasers or their assigns";

And whereas there has been deposited in the General Land Office an order bearing date January 28th, 1869, from the Secretary of the Interior, and a subsequent order, dated August 23rd, 1870, accompanied by a "schedule of allotments to certain half-breeds and full-bloods of the Sac and Fox of the Mississippi tribe of Indians," for which patents are to issue in accordance with the terms of the amended seventeenth article of the treaty aforesaid with the said Indians, upon which schedule Kish-kah-swah is designated as the allottee for the south half of section sixteen, in township seventeen south, of range eighteen east, in the State of Kansas, containing three hundred and twenty acres, according to the official plat of survey returned to the General Land Office by the surveyor general, and Kish-kah-swah is designated in said schedule as the person to whom patent is to be issued:

Now know ye that the United States of America, in consideration of the premises, and in conformity with the said treaty, the "schedule" and "order" aforesaid, have given and granted, and by these presents do give and grant, unto the said Kish-kah-swah, and to her heirs, the tract of land above described, to have and to hold the same, together with
14 all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Kish-kah-swah and to her heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington this seventeenth day of December, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninety-fifth.

By the President.

U. S. GRANT,

[SEAL OF GENERAL LAND OFFICE.] By J. PARRISH,
Secretary.

J. F. STOCK,
Acting Recorder of the General Land Office, ad interim.

Rec. vol. 13th, pages 174 & 175.

Copy of Exhibit D, described in and made a part of this petition.

The United States of America to all to whom these presents shall come, greeting:

Whereas in the amended 17th article of the treaty between commissioners on the part of the United States, and certain chiefs of the tribe of Sac and Fox Indians of the Mississippi, on the part of the said Indians, concluded February 18th, 1867, it is stipulated "that the half-breeds and full-bloods of the tribe who were entitled to selections of land under the Sac and Fox treaty, ratified July ninth, one thousand eight hundred and sixty, and which selections have been approved by the Secretary of the Interior, shall be entitled to patents in fee simple for the lands heretofore selected according to the schedule annexed to this treaty: Provided, That where such selections have been made, and the allottees have sold their lands for a valuable consideration, not less than one dollar and twenty-five cents per acre, the Secretary of the Interior shall, upon full proof being made, cause patents to issue to the purchasers or their assigns":

And whereas there has been deposited in the General Land Office an order bearing date January 29th, 1869, from the Secretary of the Interior, accompanied by a "schedule of allotments to certain half-breeds and full-bloods of the Sac and Fox of the Mississippi tribe of Indians, for which patents are issued in accordance with the terms of the amended 17th article of the treaty" aforesaid with the said Indians, upon which schedule Jane Goodell is designated as the allottee for the northwest quarter, the northwest quarter of the northwest quarter and the east half of the northwest quarter of sec. ten, and the northwest quarter of the northwest quarter of section eleven, in township seventeen south, of range eighteen east, in the State of Kansas, containing three hundred and twenty acres, according to the official plat of survey returned to the General Land Office, and Jane Goodell is designated in said schedule as the person to whom patent is to be issued:

Now know ye that the United States of America, in consideration of the premises, and in conformity with the said treaty, the "schedule" and "order" aforesaid, have given and granted, and by these presents do give and grant, unto the said Jane Goodell, and to her heirs, the tract of land above described, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereto belonging, unto the said Jane Goodell, and unto her heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington this seventeenth day of December, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninety-fifth.

By the President.

U. S. GRANT,

[SEAL OF THE GENERAL LAND OFFICE.] By J. PARRISH,
Secretary.

J. F. STOCK,
Acting Recorder of the General Land Office, ad interim.

Rec. vol. 13, pages 192 & 193.

And afterwards, to wit, on the 24th day of June, A. D. 1875, the defendants, Geo. D. Stinebaugh, as county clerk, Milo R. Harris, as county treasurer, and the board of county commissioners of Franklin County, Kansas, filed in the office of the clerk of the district court their joint answer to the plaintiff's petition, which answer is in words and figures following, to wit:

In the district court Franklin County, Kansas.

SARAH A. PENNOCK, PLAINTIFF,
vs.
GEO. D. STINEBAUGH ET AL., DEFENDANTS. } No. 1729.

Answer of Geo. D. Stinebaugh, county clerk, Milo R. Harris, county treasurer, and the board of county commissioners.

I. The defendants admit the allegations contained in plaintiff's petition set forth in causes of action number two, three, and four.

II. The defendants deny each and every other allegation of plaintiff's petition not hereinafter especially admitted, and say further that the Sac and Fox tribe of Indians, of which the plaintiff claims to be a member, in the year 1870, according to the provisions of the treaty of 1868, referred to in plaintiff's petition, removed to their reservation in the Indian Territory; that since that time they have had no tribal organizations within the State of Kansas; that their agency and council have ever since been in said Territory, their tribal authority confined thereto, and they did not, by any treaty with the United States, reserve to themselves any political or peculiar rights over any territory or lands within the bounds of the State of Kansas, nor were any such rights reserved for them.

III. The plaintiff is a citizen of the State of Kansas, amenable to its laws, as was the plaintiff's former husband, William Whistler.

IV. The defendants deny that said levy and sale were illegal.

MECHEM & MECHEM,
Attorneys for Defendants.

And afterwards, to wit, July 7th, 1875, the plaintiff filed in the office of the clerk of the district court her reply to the joint answer of the defendants, which reply is as follows:

Replication.

Franklin County district court.

SARAH A. PENNOCK, PLAINTIFF,
vs.
GEO. D. STINEBAUGH, AS COUNTY CLERK OF the county of Franklin, State of Kansas, Milo R. Harris, treasurer of Franklin County, the board of county commissioners of the county of Franklin, et al., defendants. } No. 1729.

The plaintiff for her replication to the joint answer of Geo. D.
16 Stinebaugh, as county clerk of the county of Franklin, State of Kansas, Milo R. Harris, as treasurer of Franklin County, the board of county commissioners of the county of Franklin, denies all and singular the material allegations of new matter therein set forth.

JNO. W. DEFORD,
Plaintiff's Attorney.

And afterwards, to wit, on the 10th day of November, at the November term, A. D. 1875, of the district court of Franklin County, Kansas, the following decree was rendered, to wit:

Decree.—Nov. 10, 1875.

In the district court in and for Franklin, State of Kansas.

SARAH A. PENNOCK, PLAINTIFF,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the County of Franklin, State of Kansas, George D. Stinebaugh, as county clerk of the county of Franklin, State of Kansas, A. L. Niccolls, C. M. Niccolls, W. E. Haxton, J. T. Chamberlain, and Milo R. Harris, as treasurer of Franklin County, defendants. } No. 1729.

And now comes as well the plaintiff by John W. Deford and Geo. R. Peck, her attorneys, as the defendants, the board of county commissioners of the county of Franklin, State of Kansas, Milo R. Harris, as treasurer of Franklin, and George D. Stinebaugh, as county clerk of the county of Franklin, by H. C. Mechem, county attorney of Franklin County, their attorney, and A. L. Niccolls and C. M. Niccolls, by H. B. Hughbanks, their attorney, and W. E. Haxton and J. T. Chamberlain, by Benson and Parkinson, their attorneys, and this cause came on first

to be heard upon the respective demurrers of A. L. Niccolls and C. M. Niccolls and of W. E. Haxton and J. T. Chamberlain, and were argued together by counsel. Upon the consideration whereof the court doth overrule both said demurrers, to which rulings the said A. L. Niccolls and C. M. Niccolls then and there duly excepted, and declining to answer, but abiding their said demurrer, and the said W. E. Haxton and J. T. Chamberlain thereupon forthwith filing their answer and announcing themselves ready to proceed to trial, this cause came on further to be tried by the court here by the consent of said parties upon the petition and exhibit therewith filed and the several answers of the said board of county commissioners, George D. Stinebaugh, as county clerk as aforesaid, Milo R. Harris, as such county treasurer, and the replication thereto, and the answer of the said W. E. Haxton and J. T. Chamberlain, and the replication thereto, and upon an agreed statement of facts, filed in this cause, and was argued by counsel, in consideration whereof the court doth find for the plaintiff. It is therefore considered and decreed that the temporary injunction heretofore granted in this cause be made perpetual; that is to say, that the said George D. Stinebaugh, as such county clerk, and his servants, agents, deputies, and successors in office and each of them be, and they are hereby, perpetually enjoined and restrained from executing or delivering a tax deed of the lands in plaintiff's petition described, to wit, the southwest quarter (S. W. ¼) of the southwest quarter (S. W. ¼) of section thirty-five (35) in township No. sixteen (16) south, of range No. eighteen (18) east; the west half (W. ½) of the northwest quarter (N. W. ¼), and the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of section No. two (2), in township No. seventeen (17) south, of range eighteen (18) east; the east half (E. ½) of section No. three (3), in township No. seventeen (17) south, of range eighteen (18) east; the south half (S. ½) of section sixteen (16), in township No. seventeen south, of range eighteen
17 (18) east; the northeast quarter (N. W. ¼) of section No. ten (10), in township No. seventeen (17) south, of range No. eighteen (18) east; the northwest quarter (N. W. ¼) of the northwest quarter (N. W. ¼) of section ten (10), in township seventeen (17) south, of range eighteen (18) east; the east half (E. ½) of the northwest quarter (N. W. ¼) of section No. ten (10), in township seventeen (17) south, of range eighteen (18) east; the northwest quarter (N. W. ¼) of the northwest quarter (N. W. ¼) of section No. eleven (11), in township No. seventeen (17) south, of range eighteen (18) east, being all the land described in plaintiff's petition, and containing eleven hundred and twenty acres (1,120) of land, or any part thereof, to the said A. L. Niccolls, C. M. Niccolls, W. E. Haxton, or J. T. Chamberlain or their or either of their agents, attorneys, or assigns.

And it is further adjudged and decreed that all and singular the tax sales of said lands and of every part thereof mentioned in said plaintiff's petition were illegal and void, and the same are hereby set aside and held for naught, and that the plaintiff have and recover of and against said defendants her costs in and about her suit in this behalf expended, taxed at $15.40, and hereof let execution issue.

And afterwards, to wit, on the 11th day of November, A. D. 1875, the defendants, the board of county commissioners of Franklin County, Kansas, Geo. D. Stinebaugh, as county clerk, and Milo R. Harris, as county treasurer, filed the following motion for a new trial in this cause, to wit:

Motion for a new trial.

In the district court, Franklin County, Kansas.

SARAH A. PENNOCK, PLAINTIFF,
vs.
GEO. D. STINEBAUGH ET AL., DEFENDANTS.

The defendants, Geo. D. Stinebaugh, the board of county commissioners of Franklin County, Kansas, and Milo R. Harris, by Mechem & Mechem, their attorneys, move the court to set aside its decision in this cause and grant them a new trial for the following reasons, effecting substantially the defendant's rights:

1st. The decision is contrary to law.

2nd. The decision is not sustained by sufficient evidence.

MECHEM & MECHEM,
Defendant's Attorneys.

And afterwards, to wit, on the 30th day of November, A. D. 1875, at the November term of said court, among the rest the following proceedings were had in the above entitled cause, to wit:

In the district court in and for Franklin County.

SARAH A. PENNOCK
vs.
GEO. D. STINEBAUGH, COUNTY CLERK, ET AL. } No. 1729.

This cause coming on to be heard upon the motion for a new trial heretofore filed in this case, and the court having heard the argument of counsel and being fully advised in the premises, doth overrule said motion; to which ruling of the court the defendant, by his counsel, then and there duly excepted, and for good cause shown the court, the defendant was given sixty days from this date in which to make a case for the supreme court.

18 And afterwards, to wit, on the 30th day of January, A. D. 1876, the following "case matle" was filed in the office of the clerk of the district court in the foregoing entitled cause, to wit:

Case made for the supreme court.

In the district court, Franklin County, Kansas.

SARAH A. PENNOCK, PLAINTIFF,
vs.
GEO. D. STINEBAUGH, COUNTY CLERK, MILO R. Harris, county treasurer, the board of county commissioners of Franklin County, Kansas, et al., defendants. } No. 1729.

This cause was tried at the November term, 1875, of the above named court, the Hon. O. A. Bassett, judge, and judgment had for the plaintiff.

The said cause was tried upon the pleadings and the following agreed facts:

I. It is hereby agreed by and between the parties hereto that the first paragraph of the plaintiff's petition is true.

II. That the Sac and Fox tribes mentioned in petition, in 1870 removed from their reservation in Kansas to their reservation in the Indian Territory, and have ever since maintained their tribal organization in said Indian Territory.

III. That at the time of the making and ratification of said treaty in 1860, the tribe numbered between nine hundred and one thousand souls.

IV. That the facts stated in a letter of Enoch Hoag, marked A, and hereto attached, are true and may be read in evidence in the case.

V. That the copies purporting to be copies of the patents issued to Sarah A. Whistler and other allottees by the United States, and annexed to plaintiff's petition, marked Exhibits A, B, C, & D, are true copies of the patents; it is also agreed that Mrs. Pennock did not remove with the tribe in 1870, but has continued to reside in the State.

(Copy.)

EXHIBIT A.

LAWRENCE, KANSAS, 7 *mo.*, 19, 1875.

J. W. DEFORD, Esq.:

I am in receipt of thy letter of the 14th inst., enquiring if the half breed Sac and Fox Indians, who had assigned to them allotments of land, are members of the tribe. In reply, the half breed Sac and Foxes are now in tribal relationship and receive annuities semi-annually; some of this class are yet in Kansas, but receive their pay in I. T. agency. A clause is in treaty prohibiting annuity payments to any off the reserve. That had special reference to bands; and Mo-ko-ho-ko's band have not received annuity by reason of absence.

Resp'y,

ENOCH HOAG, *Supt.*

The parties then admitted that the Sac and Fox half breeds referred to in the above letter are the half breeds of the Sac and Fox tribes of the Mississippi referred to in the treaties of July 9th, 1860, and October 14th, 1868, between the United States and the tribes.

The foregoing is all the evidence introduced in this case, which was tried by the court November tenth, 1875, and judgment for plaintiff. Whereupon defendants moved for a new trial, which at the hearing thereof, November thirtieth, 1875, the court overruled, to which ruling of the court the defendants duly excepted and were allowed by the court sixty days to make a case.

19 And now, to wit, January 29, A. D. 1876, come the parties, the commissioners of the county of Franklin, and the other above named county officers, defendants, by Mechem & Mechem, their attorneys, and the plaintiff by John W. Deford, her attorney, and agree that the foregoing "case made" is correct and may be signed as such, and therefore the same is by me hereby settled, allowed, and signed this 29th day of January, A. D. 1876.

[SEAL.]

OWEN A BASSETT,
Judge 4th Judicial District.

Attest:

S. L. PATRICK,
Clk Dist. Ct.

STATE OF KANSAS,
Franklin County, ss:

I, S. L. Patrick, clerk of the district court in and for said county and State, do hereby certify that the above and foregoing is a true and correct copy or transcript of the process, pleadings, and proceedings now on file and of record in my office in the foregoing entitled case.

Witness my hand and the seal of the district court affixed at my office in the city of Ottawa, this 31st day of January, A. D. 1876.

SEAL OF DISTRICT CT., FRANKLIN CO.

S. L. PATRICK.

And said petition in error and transcript attached thereto is endorsed:

No. 1100. The Board of Co. Com's of Franklin Co., Kan's, et als., pl'ffs in error, vs. Sarah A. Pennock et als., def'ts in error. Filed Feb. 7th, 1877. A. Hammatt, clerk supreme court, Kansas.

20 And be it further remembered that at the January, 1877, term of the supreme court of Kansas, and on March 1st, 1877, the following proceedings were had, viz:

THE BOARD OF COUNTY COMMISSIONERS OF Franklin County, pl'ff in error, *vs.* SARAH A. PENNOCK, DEFENDANT IN ERROR. } 1100.

Now comes H. B. Hughbanks, esq., counsel for said plaintiff in error, and upon his motion in writing and filed herein it is ordered that this cause be taken out of its order upon the trial docket and set for hearing with the cases next to be called by this court.

21 And be it further remembered that at the July, 1877, term of said supreme court of Kansas, the following proceedings were had in said case, to wit:

THE BOARD OF COUNTY COMMISSIONERS OF Franklin County, Kansas, et als., pl'ffs in error, *vs.* SARAH A. PENNOCK ET ALS., DEF'TS IN ERROR. } 1100.

This cause came on to be heard on petition in error and transcript of the record of the district court of Franklin County, and was submitted on briefs of counsel, Benson & Parkinson, esq'r's, for plaintiffs in error, and John W. Deford, esq., for defendants in error, and taken under advisement by the court.

22 And be it further remembered that at said July, 1877, term of said supreme court, and on the 31st day of August, A. D. 1877, the following proceedings were had in said cause, to wit:

THE BOARD OF COUNTY COMMISSIONERS OF Franklin County, Kansas, plaintiff in error,
vs.
SARAH A. PENNOCK, A. L. NICCOLLS, C. M. Niccolls, J. T. Chamberlain, and W. E. Haxton, defendants in error. } 1100.

This cause came on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be reversed, and the cause remanded, with instructions to the court below to dissolve the injunction heretofore allowed, and to enter judgment in favor of said plaintiffs in error for all costs. And further ordered, that said defendants in error pay the costs of this court, taxed at $, and hereof let execution issue.

HORTON, C. J., delivered the opinion of the court, all the justices concurring.

And thereupon the following syllabus and opinion of said court in this case was filed and made of record in said cause, to wit:

23 Supreme court State of Kansas. Error from Franklin County.

THE BOARD OF COUNTY COMMISSIONERS OF the county of Franklin et als.
vs.
SARAH A. PENNOCK.

Reversed.

Syllabus by the court.

HORTON, C. J.:

I. The lands belonging to the mixed and half bloods of the Sac and Fox Indians, residing in Kansas, but who have tribal relations with the confederated tribes in the Indian Territory, are taxable and alienable, where the government has issued to the allottees, under amended article 17 of the treaty of February 18th, 1867, patents in fee simple therefor.

All the justices concurring.

Error from Franklin County.

THE BOARD OF COUNTY COMMISSIONERS OF the county of Franklin et al.
vs.
SARAH A. PENNOCK. } No. 1100.

Opinion by the court.

HORTON, C. J.:

The sole question presented by the record in this case is whether the lands belonging to the mixed and half bloods of the Sac and Fox Indians residing in Kansas, but who have tribal relations with the confederated tribes of the Sacs and Foxes of the Mississippi, are taxable. The authorities of Franklin assert the right, and the district court of that county having denied it, and having granted a perpetual injunction

against certain tax deeds being issued embracing lands of the defendant in error, the question is properly here for consideration.

The lands described in the petition were allotted to Mrs. Pennock and her vendors under article 10 of the treaty with the Sac and Fox Indians of October 1st, 1859. (15 U. S. Stat. at Large, 470.)

By virtue of the amended 17th article of the Sac and Fox treaty of February 18th, 1867 (15 Stat. at Large, 498), the lands were conveyed to the allottees by the government by patents in fee simple.

It is claimed on the part of the defendant in error that the following provision of said section 10 of the treaty of 1859 exempts these lands from taxes, viz, "The lands granted by this article shall remain inalienable, except to the United States or members of the tribe."

This court settled this question in Krause vs. Means (12 Kans., 335). In that case it was held that by virtue of said amended 17th article of the treaty of February 18th, 1867, "the restraint upon the alienation imposed by the old treaty of 1859 was abrogated." In that case Julia Godell, a half-breed, and a member of the same Sac and Fox tribe, conveyed land allotted to her to one Mary A. Means. This opinion fully covers the question in dispute. If the lands are not taxable, they cannot be conveyed except subject to the limitations of section 10 of the treaty of 1859. If such section is abrogated by the amended section No. 17 of the treaty of 1867, the lands are both taxable and subject to sale and conveyance to any person.

We do not now care to open the question anew. Rights of property have undoubtedly been acquired by various parties since the above decision was announced, which would be disturbed by an adverse ruling, and if any error has been committed by this court, the defendant in error can be fully protected in a case of this character on a review
24 of our decision by the Supreme Court of the United States.

We are of the opinion that "when the rules laid down by the courts become the laws which sustain titles and contracts, they are, in general, to be sacredly adhered to." (Church vs. Brown, 21 N. Y., 335.)

The learned counsel for the defendant in error participated in the argument in this court in the said case of Krause vs. Means, supra, and then insisted here that "art. 10 ceased to operate in 1867, when the treaty of that year took effect," and that "ever since the United States conveyed the property in fee simple to Julia Godell, and, a fortiori, since it belonged to Mrs. Means, it has been subject exclusively to the laws of Kansas." (See brief, 12 Kans., 336.)

If the argument presented then by the counsel for the defendant in error in this cause was good law, and so this court assumed, it is equally applicable now. To him, under the circumstances, the writer of this might well reply that sometimes "even-handed justice commends the ingredients of our poisoned chalice to our own lips."

If it be claimed, however, that the expression in Clarke vs. Libbey (14 Kans., 435), that the issuance of patents for lands in fee simple under the terms of an Indian treaty does not necessarily carry an implication of a full title, sustains the present argument of the counsel for defendant in error, we answer, that not merely the provision for the patents to issue to the Sac and Fox half breeds by section 17th, of the treaty of 1867, but the general object and purview of the entire treaty, is in conflict with any idea that after such last treaty was proclaimed the lands allotted by section 10 of the treaty of 1859, and patented under section 17 of the new treaty, were to continue to be inalienable. The purpose of the latter treaty was not to change the character of the re-

serve, but to abolish it as a reserve. The object of the treaty was to remove the tribe from Kansas and to furnish them homes in the Indian country. A clause is contained in said treaty of 1867 to the effect "That no part of the funds arising from or due the nation under this or previous treaty stipulations shall be paid to any band or parts of bands, who do not permanently reside on the reservation set apart to them by the government in the Indian Territory, as provided in this treaty, except those residing in the State of Iowa." In obedience to the obligations of this treaty, the tribe, numbering about one thousand in 1870, removed from their reservation in this State to their new reservation in the Indian Territory, where they have since lived, maintaining their tribal organization. Mrs. Pennock remained in Kansas, and is now with her husband, who is a white man, a resident of the State. There is no longer any tribal organization of these Indians in our State, there are no chiefs, no councils, and no stated meetings of the tribe.

All of this was anticipated in the treaty of 1867. In pursuance of this result, the government provided for the issuance of patents in fee simple to the allottees among the mixed or half blood Sac and Fox's, and by virtue of the said treaty of 1867 abrogated the restraint upon the alienation imposed by the old treaty. After the issuance of these patents, the lands therein conveyed were alienable and taxable in the full meaning these terms imply. The judgment will be reversed, and an order will be directed to the court below to dissolve the injunction heretofore allowed, and to enter judgment in favor of plaintiffs in error for all costs.

All the justices concurring.

25 In the Supreme Court of the United States of America.

SARAH A. PENNOCK, A. L. NICCOLLS, C. M. Niccolls, J. T. Chamberlain and W. E. Haxton, plaintiffs in error,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Franklin County, George D. Stinebaugh, clerk, & Milo R. Harris, treasurer of Franklin County, defendants in error.

In error to the supreme court of Kansas.

And now come Sarah A. Pennock, A. L. Niccolls, C. M. Niccolls, J. T. Chamberlain and W. E. Haxton, plaintiffs in error, above named, by George E. Peck and John W. Deford, their attorneys, and say that in the record and proceedings aforesaid, that is, in the record and proceedings mentioned in the writ of error herein, there is manifest error in this, to wit:

First. That the said supreme court of Kansas erred in reversing the judgment of the district court of Franklin County, Kansas, and
26 in remanding the said cause to said district court with instructions to dissolve the injunction theretofore allowed by said district court, and to enter judgment in favor of said defendants in error herein for all costs; and in ordering the plaintiffs in error herein to pay the costs of said supreme court; and in not affirming the said judgment of the district court aforesaid in all things.

Secondly. That the said supreme court of Kansas erred in holding and adjudging the lands of the said Sarah A. Pennock, in her petition

filed in the district court aforesaid described, to be subject to taxation by the State of Kansas.

Thirdly. That said supreme court of Kansas erred in holding and adjudging the said lands to be alienable by the respective allottees thereof to any other person or persons than other members of said Sac & Fox tribes, or to the United States aforesaid.

Lastly. That the said supreme court of Kansas erred in giving
27 judgment for the defendants in error herein, whereas by the law of the land it ought to have given judgment for the plaintiffs in error herein.

And the said Sarah A. Pennock, A. L. Niccolls, C. M. Niccolls, J. T. Chamberlain and W. E. Haxton pray that the judgment of the supreme court of Kansas may be reversed, annulled, and held for naught; and that the judgment of the district court of Franklin County, Kansas, aforesaid may be affirmed; and that these plaintiffs in error may be restored to all things they, or any of them, have lost by occasion of said judgment.

GEORGE R. PECK AND
JOHN W. DEFORD,
Attorneys for Plaintiffs in Error.

(Indorsed:) No. 1041. Sarah A. Pennock et al., pl'ffs in error, vs. The Board of County Commissioners of the county of Franklin et al., def'ts in error. Assignments of error. Filed 17 January, 1878. Geo. R. Peck, Topeka, Kans., & John W. Deford, Ottawa, Kansas, att'ys for pl'ffs in error.

28 STATE OF KANSAS,
Supreme Court, ss:

I, Abram Hammatt, clerk of the supreme court of the State of Kansas, do hereby certify that the foregoing is a true and correct transcript of the record of said supreme court in the case wherein the Board of County Commissioners of Franklin County, Kansas, Geo. D. Stinebaugh, clerk, and Milo R. Harris, treasurer of Franklin County, Kansas, are plaintiffs in error, and Sarah A. Pennock, A. L. Niccolls, C. M. Niccolls, J. T. Chamberlain, and W. E. Haxton are defendants in error, as the same appears by the records of said supreme court.

As witness my hand and the seal of said court hereto affixed at my office in Topeka, Kansas, this the 2nd day of January, A. D. 1878.

[SEAL.] A. HAMMATT,
Clerk Supreme Court State of Kansas.

(Indorsement on cover:) No. 382. Sarah A. Pennock, A. L. Niccolls, C. M. Niccolls, J. F. Chamberlain, & W. E. Haxton, plaintiffs in error, vs. The Board of County Commissioners of Franklin County, George D. Stinebaugh, clerk, and Milo R. Harris, treasurer of Franklin County. Kansas sup. court. Filed 17th January, 1878.

OFFICE SUPREME COURT U.S.
FILED
DEC 1 1880
JAMES H. McKENNEY, Clerk.

IN THE SUPREME COURT

OF THE UNITED STATES.

SARAH A. PENNOCK, A. L. NICCOLLS, C. M. NICCOLLS, J. F. CHAMBERLAIN, AND W. E. HAXTON, *Plaintiffs in Error*,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF FRANKLIN, GEORGE D. STINEBAUGH, CLERK, AND MILO R. HARRIS, TREASURER OF FRANKLIN COUNTY.
} No. 1729.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

GEO. R. PECK,
THOS. RYAN,
Attorneys for Plaintiffs in Error.

IN THE SUPREME COURT

OF THE UNITED STATES.

SARAH A. PENNOCK, A. L. NICCOLLS, C. M. NICCOLLS, J. F. CHAMBERLAIN, AND W. E. HAXTON, *Plaintiffs in Error*,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF FRANKLIN, GEORGE D. STINEBAUGH, CLERK, AND MILO R. HARRIS, TREASURER OF FRANKLIN COUNTY.

No. 1729.

STATEMENT OF THE CASE.

This suit was originally brought in the District Court of Franklin county, Kansas. The object of the suit was to enjoin the Board of Commissioners of said county, and the Clerk and Treasurer thereof, from executing or delivering a tax deed or deeds of certain lands to the other defendants, and to have the tax sales of said land declared illegal and void.

The grounds upon which the plaintiff, Mrs. Sarah A. Pennock, claimed such relief, were, that she was an Indian, and a member by blood, birth and descent of the "Confederate Tribes of Sacs and Foxes of the Mississippi;" that by virtue of article 10 of the treaty proclaimed July 9th, 1860, between the United States and said tribe, there was assigned to her, as one of the "mixed bloods," certain lands mentioned in her

petition, and to Susan J. Goodell, Kish-kah-swah, and Jane Goodell, who were also "mixed bloods," certain other lands therein described; that said last-mentioned mixed bloods had sold and conveyed to her the lands so allotted or assigned to them; that by virtue of the amended 17th article of the treaty proclaimed October 14, 1868, patents in fee simple had been duly issued to the plaintiff and the other allottees mentioned, to whose rights she had succeeded; that under the treaties between the United States and said tribe of Indians, said lands were not taxable while owned by members of the tribe, and that the county authorities of Franklin county, Kansas, in which they were situated, asserted the right to tax them, and had sold them for taxes.

The sole question in the case was, therefore, whether the lands of the mixed and half-bloods of said Sac and Fox tribe, while in tribal relation, are taxable by the local authorities where the lands are situated.

The evidence was agreed upon by the parties, as appears by the record herein, page 14. The District Court of Franklin county held that the lands were not taxable, and gave the plaintiff a decree. The Supreme Court of Kansas held that they were taxable, and reversed the decision of the District Court.

The case is brought to this court to have the decision of the Supreme Court of Kansas reviewed, and to have plaintiff's rights as a member of said tribe established by the decree of this court.

The plaintiffs in error, other than Mrs. Pennock, are so, because upon refusing to join in the appeal from the District Court of Franklin county to the Supreme Court of the State, they were made defendants in error, and judgment rendered against them for costs, from which they seek to be relieved. (Record, page 16.)

ASSIGNMENT OF ERRORS.

I. The court erred in holding that the lands described in plaintiff's petiition were taxable while held by members of the confederate tribe of Sacs and Foxes of the Mississippi.

II. The court erred in reversing the judgment of the District Court of Franklin county, and in directing that court to dissolve the injunction and to enter judgment in favor of the plaintiffs in error for costs.

BRIEF AND ARGUMENT.

We shall endeavor in this argument to establish two propositions, either of which, if correct, would require a reversal of the decision of the court below. That both are sound, just, and reasonable, we think is clear beyond all question.

I. The lands in controversy are protected from State taxation, while held by a member of the tribe, by the plain terms of the treaties under which they are held.

II. While the tribal relation continues, lands held by a member of the tribe are exempt from State taxation on general principles, and independent of treaty stipulations.

TREATY PROVISIONS.

The lands in question are a part of the reserve assigned to the Sac and Fox tribe "for a permanent and perpetual resi-"dence for them and their descendants," by article 2 of the treaty of 1842. (7 Stats. 596.)

The tribe held the lands in common, without any provision for a different tenure, until the treaty of 1859. (15 Stats. 467.) This last treaty introduced the severalty system; it provided for assignments of limited quantities of the lands to individual members of the tribe; but it imposed stringent limitations and restrictions on the right of alienation. If

the court will examine article 10, the origin of the present title will be discovered. The Sacs and Foxes were anxious to make suitable provision for "their mixed and half-bloods," etc., and accordingly provided for an assignment or allotment of three hundred and twenty acres to each. The lands so assigned were to "remain inalienable, except to the United "States or members of the tribe."

The object of this provision was, manifestly, to prevent any rights or interests attaching to such lands, except those of the United States and members of the tribe. A special and distinct character was given them; or, to speak more accurately, *their ancient, special and distinct character as Indian lands was preserved.* The beneficiaries of this provision of the treaty took no new or different title, but simply received the right to enjoy the possession or occupancy of the lands in severalty, which they had for years enjoyed in common. The Indian title, as this court has often said, is a usufruct—a right of occupancy only. A division of the lands into distinct and several tracts, obviously does not create any additional interest in the lands. A partition between tenants in common does not strengthen or elevate the title of either, but gives to each the same rights in severalty which he had formerly enjoyed in common, and no more.

It has never been claimed that while these lands were held by virtue of article 10 they were taxable. Their nontaxability under that article has always been conceded; but it is claimed that they have become taxable by virtue of the provisions of a subsequent treaty. This brings us to the consideration of the treaty of 1867.

THE TREATY OF 1867.

This treaty is to be found in 15 Stats., page 495. The object of the treaty was to remove the tribe to another reser-

vation in the Indian Territory. To secure such removal, a sale of the lands in Kansas, whether held in severalty or in common, was made to the United States. To this general sweeping sale there were, however, certain exceptions, viz.:

1st. Article 11 excepts from the sale certain lands, to be allowed to John Goodell and others.

2d. Article 12 excepts certain lands to be allowed Samuel Black, and article 13 makes an unimportant exception in favor of Thomas C. Stevens & Co.

3d. Article 17 excepts from the sale the lands of those, whether full-bloods or half-breeds, who were entitled to selections under the former treaty.

All these articles provide for patents in fee simple. Upon the issuing of patents in fee simple, the Indians receiving them, for the first time take an interest in the land itself. Prior to the giving of the patents they are occupants only. After the patents they are owners, with an interest in the soil.

Now, when members of an Indian tribe (for the persons whose rights are involved herein are all members of the Sac and Fox tribe) become fee-simple proprietors, what rights and liabilities attach to them? This inquiry suggests two others, viz.:

1st. What are the attributes of a fee-simple tenure in a member of an Indian tribe?

2d. What is the effect of article 18 of the treaty of 1867, which requires the approval of the Secretary of the Interior to alienation?

As to the first question, it may be safely asserted that the term "fee simple," when applied to Indian titles, does not necessarily carry with it the ordinary characteristics of a common-law fee. Even the Supreme Court of Kansas, which, like the courts of most of the Western States, has

been swift to subject the Indian to the white man's law, admits the distinction between the term "fee simple" as used in Indian treaties, and the same expression in its ordinary sense.

In *Clark vs. Libbey*, 14 Kas. 438, Mr. Justice BREWER says:

"Again, it is said that patents are to be issued for these lands in fee simple, and this implies a full title, free from any restrictions upon alienation. This expression, at least when used in Indian treaties, carries no such necessary implication."

The Indian is an anomaly. He is not a citizen; he is not an alien. He is, to use a hackneyed phrase, "a ward of the "Government." Fifty years ago, Chief Justice MARSHALL, with remarkable felicity of expression, denominated the Indian tribes "domestic dependent nations;" and, in the same opinion, characterized their relation to the United States as resembling that of a ward to his guardian. (*The Cherokee Nation vs. The State of Georgia*, 5 Peters, 1.)

Now, a fee-simple patent to a member of an Indian tribe by no means emancipates him from his tribal relations. The United States continues to be his guardian, and he continues to be just what he was before, namely, a ward.

We therefore submit, that the term "fee simple," in a patent to an Indian, does not necessarily carry with it the right of alienation.

THE RESTRICTIONS OF THE TREATY.

But the treaty under which these fee-simple patents are issued speaks for itself as to the rights of the patentees. If the court will examine article 18, it will be noticed that it requires the consent of the Secretary of the Interior to all sales "hereafter made by or on behalf of persons to whom "lands are assigned in this treaty."

Substantially, this provision is found in nearly all treaties

which create severalty owners. It recognizes the inability of the average Indian to manage his own affairs. It takes notice of his fatal weakness, and seeks to protect him from it. The Indian is passionately fond of a trade, a big sale, in which everything is given, and nothing received. He has unlimited confidence in himself, but with all his cunning and shrewdness, he is but a little child. A treaty which gives an Indian power to alienate, gives his white neighbor power to confiscate. Provisions of treaties, which restrict the Indian's control of his property, instead of being an infringement of his rights, are his highest protection, and the courts should carefully and vigorously uphold them.

Article 18 was intended to protect the newly-made fee-simple proprietors from their own infirmities. The preceding article (17) gave those who had made selections under article 10 of the former treaty, the right to have patents in fee simple. Article 18 provided for protecting them in the enjoyment of the lands which should be patented.

The point was made in the court below, that article 18 does not refer to the lands to be patented under article 17, but to such as should be patented under articles 11 and 12. But this is clearly an erroneous view. Article 18 limits the power of alienation of all the persons to whom lands are assigned; but we assert, without any doubt as to the correctness of our position, that it had special reference to those mentioned in article 17, of whom Mrs. Pennock is one.

In the first place, its position in the treaty is significant. If it has reference solely to those mentioned in articles 11 and 12, why was it not put into the treaty following those articles? Why does it immediately follow article 17, if those mentioned in article 17 are not included in its protection? There can be no reason why those mentioned in articles 11 and 12 should be permitted to alienate, and those mentioned

in 17 forbidden; and there is no logical or grammatical rule that authorizes us to jump backward over article 17 to find in articles 11 and 12 the class of Indians to be protected. All three of the articles, 11, 12, and 17, provide for patents in fee simple. It does not appear that there is any difference in the intelligence and capacity of those mentioned in the different articles. Indeed, Sarah A. Whistler (now Sarah A. Pennock, and the plaintiff in this case) appears in both article 11 and in the list attached to the treaty as entitled to lands under article 17. Can any reason be found in the treaty or elsewhere for giving her power to convey under article 17, and refusing it under article 11? She is a patentee under both, and her intelligence and capacity are as great under one as the other. It is, therefore, clear to us that the restrictions of article 18 apply to those receiving patents under article 17, as well as those under 11 and 12. But we go further, and assert *that article 18 refers and was intended to refer specially and peculiarly to article 17.*

If the court will examine article 17, it will be noticed that its concluding sentence refers to sales which allottees had made, and had since died, and for which lands the Secretary of the Interior, upon full proof being made, was to cause patents to issue to the purchasers or their assigns. Then comes immediately the provision of article 18, governing sales *hereafter* made. The last paragraph of article 17 refers to *past* sales; the very next sentence refers to *future* sales. Their connection is so obvious that it is only necessary to mention it to see its full force.

But one other argument has been made, that we are aware of, against this position, and that is, that article 18 prohibits sales to persons "to whom lands are assigned in *this* treaty," and it is urged that the lands mentioned in article 17 were not assigned in this treaty but in the former one, and that

this treaty simply provides for patents. The answer, of course, is plain. These lands are assigned in this treaty as much as any lands are, for all the lands mentioned are to be *patented*.

If articles 11 and 12, which provide for patents of the lands, are to be included under the term "assigned in this "treaty," so must 17. Article 18 must have *something* to operate on. Any argument which gives it effect on 11 and 12, and excludes 17, proves too much; for it proves that a patent in fee simple is one thing in one article, and a different thing in another article. Besides, there is a peculiar reason for applying this restriction of article 18 to the Indians mentioned in 17. Many of them were women—"whole-"bloods, who have intermarried with white men," as they are called in the treaty of 1859 (article 10). If the ordinary Indian requires the protection of the Secretary of the Interior—if John Goodell, the interpreter mentioned in article 11 of the treaty of 1867, with his intelligence, and his knowledge of the English language—requires the protection of a restriction to alienation, how much more do the squaws who, in fact and in law, are under the dominion of a white husband? But the argument of the other side is, that the treaty forbids John Goodell, who speaks two languages, and perhaps more, who is a man of consequence and of affairs, from alienating without the consent of the Secretary, but allows the women of the tribe, whose experience of life has consisted of grinding corn and rearing young barbarians, perfect freedom to sell—and be sold. We submit that no such injustice was intended.

THE EFFECT OF THE RESTRICTION ON ALIENATION.

The restriction imposed upon the alienation of these lands protects them from taxation. The consent of the Government

through its officer, the Secretary, is required to divest the Indian owner's title. If taxation can divest it without such consent, then the restriction becomes an idle and meaningless phrase. The decision of the court below went upon the ground that the lands had become alienable, and, therefore, taxable. We think we have shown that they are not alienable, and, therefore, not taxable. "If the lands are not "taxable," says HORTON, Chief Justice, "they cannot be "conveyed, except subject to the limitations of section 10 of "the treaty of 1859. If such section is abrogated by the "amended section 17 of the treaty of 1867, the lands are both "taxable and subject to sale and conveyance to any person." (See opinion of court below, record, page 16.) The court below adhered, though with much hesitation, to its former decision. (*Krause vs. Means*, 12 Kas. 335.) It followed that case, but kindly suggested that the United States Supreme Court could give us full protection. If we are correct in our view that these lands are not alienable without the consent of the Secretary of the Interior, we suppose it follows necessarily that they are not taxable. But we cite the case of the Kansas Indians, 5 Wallace 737, which fully establishes the principle. The restriction in the Shawnee patents was that "the said "lands shall never be sold or conveyed by the grantee, or his "heirs, without the consent of the Secretary of the Interior." The same restriction was in the patents to the Weas. Other considerations entered into the decision of the case of the Kansas Indians, but it was expressly decided that to protect the Indian in the permanent enjoyment of his home, it must be exempt from sale for taxes. The object of the restriction on alienation was to hold the Indian fast to the soil, to keep him on a small reservation instead of a large one, to elevate and strengthen him, and finally to teach him to rely upon his own industry and exertion for his support. Though

giving him a patent for his land, the Government still keeps its eye on him. He is still an Indian; still on his reserve. He cannot sell it without the approval of his guardian. He may cultivate it, enjoy it, possess it; but he cannot sell it, or give it away. What he cannot do directly he cannot do indirectly. He cannot, by allowing it to be sold for taxes, divest himself of title. It is like those rights which are mentioned in the Declaration of Independence, and which are declared to be "unalienable." The treaty is the supreme law. Its provisions cannot be defeated by the Commissioners of Franklin county in imposing taxes, nor by the Indian in failing to pay them.

THE TRIBAL RELATION.

We think we have shown that these lands are protected from taxation by treaty stipulations. But we go further, and assert that lands of an Indian *in tribal relation* are protected from taxation without regard to treaty provisions. The argument, applied to this case, may be formulated in two propositions:

First, Mrs. Pennock is a member of the Sac and Fox tribe of Indians.

Second, As such member, her property, *which she holds by virtue* of her tribal relation, is not subject to State taxation.

I.

As to the first proposition, the record is conclusive. The opinion of the court below opens with the statement that the sole question is, "Whether the lands, belonging to the "mixed and half-bloods of the Sac and Fox Indians, resid-"ing in Kansas, but who have *tribal relations* with the "confederated tribes of the Sacs and Foxes of the Mississippi, "are taxable?" The petition alleges that she "is an Indian, "and a member by *blood*, *birth*, and *descent* of the confederate

"tribes of Sacs and Foxes of the Mississippi," and the agreed statement of facts admits it to be true. The letter of Superintendent Hoag states that the half-breed Sacs and Foxes are in tribal relationship, and receive annuities semi-annually. Some of this class are in Kansas, but receive their pay in I. T. (Indian Territory) Agency. Supt. Hoag also states that the clause in the treaty, prohibiting annuity payments to any "off the reserve," had reference to bands, and that Mo-ko-ho-ko's band have not received annuity by reason of their absence.

It thus appears clearly and emphatically that Mrs. Pennock is a member of the Sac and Fox tribe—an Indian, by blood, birth and descent. She is presumably a half-breed; but here we must not forget to suggest to the court that her rights are precisely the same as those of the "whole-bloods who have in-"termarried with white men." They are grouped together in article 10 of the treaty of 1859. This case will settle not her rights alone, but those of all the full-bloods who are married to white men. *The decision that protects them protects her, and the decision that defeats her rights defeats theirs.* We are not going outside the record to suggest that among Indians, the line that separates full-blood from half-blood, is rather vague and shadowy. Purity of descent is a harsh criterion for the measurement of rights, even among white people. The Government recognizes her as a member of the tribe, and pays her an annuity. In short, she is an Indian. The Government recognizes her as such, and there is no other power that can gainsay it. In *United States vs. Holliday*, 3 Wallace, 407, Mr. Justice MILLER, delivering the opinion of the court, said: "In reference to all matters of "this kind it is the rule of this court to follow the "action of the Executive and other political departments of "the Government whose more special duty it is to determine

"such affairs. If by them those Indians are recognized as a "tribe, this court must do the same." And yet the Indian whose love of "fire-water" gave rise to that case had a piece of land on which he lived, and he voted in county and township elections in Michigan.

It appears in this case that Mrs. Pennock receives her annuities at the agency in the Indian Territory, though she remains in Kansas. But this signifies nothing. The treaty gives her the land for a home, and of course does not require her to go with the tribe to their common reservation in the Territory. But we submit she has lost no rights by observing the treaty and remaining on the land, and would have gained none by disregarding it and going with the tribe to the Territory. Her legal status is that of *a member of the tribe, enjoying her rights as such, on the land which she received by reason of being such.*

II.

We now come to the proposition that Mrs. Pennock's lands, *which she received by virtue of her tribal relation*, are not taxable while that relation exists, even if the treaties were silent in this respect.

The principle which establishes this proposition, as we think, is this: Lands of a tribe, held as such, cannot be taxed; and it makes no difference whether held in fee simple or by a lower tenure. Lands have been often granted to Indian tribes in fee, notably to the Cherokees, and this court decided that the tribe could take in fee simple. (*Holden vs. Joy*, 17 Wallace, 211.)

Now, if lands held by a tribe in fee simple could not be taxed, they would not become taxable by dividing them up into tracts. Lands which are not taxable, held by tenants in common, would not become taxable by a partition of

them. While the tribal relation continues, an individual member of the tribe would be no more subject to pay a tax on his land than he would to contribute to raise a tribal fund to pay taxes on a whole reservation held in fee simple by the tribe. The Indian tribes have no political relations to the States. Their relations are exclusively with the General Government. They are, to repeat the language of Chief Justice MARSHALL, "domestic dependent nations." Their rights of property, and rules of descent and distribution, are not governed by State law, but by their own customs and traditions, which constitute their jurisprudence.

In *United States vs. Payne*, 4 Dillon, 389, Judge Dillon says:

"Where Indians maintain the tribal relations, their property is not subject to the laws of the State, or their estates to be administered upon in the probate court of the State, unless by the assent of the General Government."

The case of *Mungosah vs. Steinbrook*, 3 Dillon, 418, and *Gray vs. Coffman*, 3 Dillon, 393, amply sustain this doctrine, as does the great case of *The Kansas Indians*, 5 Wallace, 73.

There is no State where this doctrine is more effectually established than in Kansas, for the organic act declares "that "nothing in this act shall be construed to impair the rights "of *person* or *property* now pertaining to the Indians in said "Territory, so long as such rights shall remain unextinguished "by treaty between the United States and such Indians;" and the language is repeated in the act of admission.

If the land of an Indian, while in tribal relation, can be taxed, his annuity can be taxed. The principle which protects one from taxation, protects the other. We suppose no one would claim that an Indian annuity could be taxed. The power to tax it is the power to destroy it, and thus render ineffectual the compacts and agreements made between the Government and the Indians. In the same way and to

the same extent the assertion of the taxing power by the State over lands of an Indian in tribal relation interferes not only with the rights of the Indian, but with the operation and policy of the General Government in the management of its wards.

In this case Mrs. Pennock is admitted to be in tribal relation with the Sac and Fox tribe. The tribe is recognized by the General Government. Whether she remains on the land, or goes with the tribe to the Territory, is no concern of the State, but is a matter exclusively within the control of the United States. If the Government permits her to remain in Kansas, we know of no authority anywhere that can call the Government to account, or deprive her of her rights. It is not for Kansas to decide whether the tribal relation continues, nor whether a member of the tribe is on or off the reservation; all that is within the exclusive province of the General Government. "*As long as the United States recog-*"*nizes their national character*, they are under the protection "of treaties and the laws of Congress, and *their property is* "*withdrawn from the operation of State laws.*" (CLIFFORD, J., in *The Kansas Indians*, 5 Wallace, 737.)

Nor does it matter whether Mrs. Pennock is illiterate or intelligent. The record does not show, and we do not know, what her accomplishments may be. But it is sufficient that the United States recognizes her as an Indian in tribal relations. Her rights do not depend upon her intelligence, but on her legal status. That status is fixed by the recognition of the General Government, and cannot be questioned by the State.

In *The State vs. Ross*, 7 Yerger, 74, the eminent Chief Justice CATRON, afterwards one of the Associate Justices of this court, indignantly repudiated the assertion that a State could tax the property of an Indian in tribal relations. He said:

"Although Lewis Ross is a gentleman of character and intelligence, and would be a highly-repectable member of any community, yet, by our laws, there are imposed upon him odious disabilities, which deprive him of many of the highest privileges which citizenship, within the meaning of the act, would confer. Not having the benefits of our Government extended to him, the Cherokee is not subject to its burthens, because taxation without representation is tyranny. The Cherokee has no vote in our elections, no right to be a representative in our Legislature, because he is no citizen; and to tax him would be practicing the same despotic power against which our ancestors so justly rebelled."

See also *United States, ex rel., vs. Shanks*, 15 Minn. 369.

Not only is the Indian not a citizen, but he cannot, by any act of his own, become one. He cannot be naturalized. The Fourteenth Amendment does not apply to him. He is an outcast, save only for the rights that his tribal membership and his guardian (the Government) give him. When the Government gets through with him, the State may take him under its protecting wing, but not before.

We wish to make one further suggestion on this branch of the case. We do not assert, although we believe we would be justified in doing so, that property, which an Indian acquires by purchase or traffic from citizens of the State, becomes untaxable as soon as the Indian becomes the owner of it. What we assert is, that property which he obtains by virtue of his tribal relation — property which is his, because he is an Indian — is not subject to State taxation. This land in question comes to Mrs. Pennock by virtue of her being a member of the Sac and Fox tribe. It was Sac and Fox land. The State had never acquired nor asserted any jurisdiction to tax it, and can point to nothing in the nature of an equitable right to impose taxes upon it.

We think we have established the proposition that the lands of Indians in tribal relations are not taxable.

MRS. PENNOCK'S MARRIAGE TO A WHITE MAN.

It will probably be urged by counsel that Mrs. Pennock's husband is a white man. We think no stronger reason could be given for protecting her by restrictions on her power to alienate.

As she could not be naturalized, her marriage does not confer upon her the citizenship of her husband. (*Kelly* vs. *Owen*, 7 Wallace, 496.)

She can only become a citizen by act of Congress or a treaty. (7 Opinion Attorney General, 750.)

She is still a member of the tribe, recognized as such by the sole authority to determine that question—the General Government.

RECAPITULATION.

1. The lands in question are inalienable without the consent of the Secretary of the Interior.

2. Being inalienable, they are untaxable.

3. Lands of an Indian in tribal relation are not subject to State taxation.

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IN THE SUPREME COURT

OF THE UNITED STATES.

SARAH A. PENNOCK, A. L. NICOLLS, C. M. NICOLLS, J. T. CHAMBERLAIN, AND W. E. HAXTUN,
Plaintiffs in Error.

vs.

THE BOARD OF COUNTY COMMISSIONERS OF FRANKLIN COUNTY, GEORGE D. STINEBAUGH, CLERK, AND MILO R. HARRIS, TREASURER OF FRANKLIN COUNTY, KANSAS.
Defendants in Error.

Brief and Argument for Defendants in Error.

W. L. PARKINSON,
A. W. BENSON,
Attorneys for Defendants in Error.

Journal and Triumph Print, Ottawa, Kansas.

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STATEMENT OF THE CASE.

The lands described in the plaintiffs petition in the Franklin County, Kansas, District Court, were first listed for taxation by the proper officers of that county for the year 1871, and the ordinary State and County taxes for that year were then duly assessed against said lands, as upon lands of like value throughout the county. In

default of payment at the time fixed by law, these lands were advertised and sold by the proper officer of said county for the taxes so assessed. The object of this action is to restrain the issuance of tax deeds upon said sales, to have said assessment and sales adjudged illegal and void, and to perpetually enjoin said county from levying and collecting State and County taxes upon said lands in the hands of the plaintiff in error, Sarah A. Pennock.

The said plaintiff in error, is a mixed, or half-blood Sac and Fox Indian, a member by birth and blood of the Confederated Tribes of the Sacs and Foxes of the Mississippi. At the date of the bringing of this suit, she was the wife of Henry L. Pennock, a white man, a resident of the State of Kansas, and a citizen of the United States. At the date of the several treaties made by her tribe with the United States, and out of which the matters in dispute herein originated, she was the wife of William Whistler, also a mixed or half-blood Indian, and a member of the same tribe, now deceased. In the year 1870, the Sac and Fox tribe, then numbering between nine hundred and one thousand persons, under treaty stipulation with the United States, ceded and relinquished their claim to their Kansas Reservation, and removed to a new reservation in the Indian Territory, where they have since remained, maintaining their tribal organization. Mrs. Pennock did not follow the tribe or remove to the Indian Territory. She is now a resident of Franklin County, Kansas, with her husband, Henry L. Pennock, though still maintaining tribal relations with the Sac and Fox Indians. A portion of the

lands referred to were allotted to her by the treaty between her tribe and the United States, proclaimed July 9th, 1860, and the remainder she procured by purchase, between May 7th, 1867, and May 30th, 1868, from other mixed and half-blood Indians of the same tribe, holding like allotments under the same treaty.

The other plaintiffs in error are the holders and owners of tax certificates issued to them under the said Franklin County tax sales of said lands, and have no other interest or standing in this cause.

BRIEF AND ARGUMENT.

The State of Kansas, through its legally constituted officers, asserts the right to tax these lands. The Supreme Court of the State affirms this right. The plaintiff in error denies any such right, and insists that her lands are beyond the reach of the Kansas tax gatherer. This is the only issue presented in this case.

Sec. 1 of the Act for the admission of Kansas into the Union, after describing the general boundaries of the State, provides:

> "That nothing contained in the said constitution, respecting the boundary of said State, shall be construed to impair the rights of person or property now pertaining to Indians of said Territory, so long as such rights shall remain unextinguished by treaty between the United States

and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any State or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas, until said tribe shall signify their assent to the President of the United States to be included within said State, or to effect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never passed."

Section one of Chap. 107 of the General Statutes of the State of Kansas, relating to the manner of levying and collecting State and County taxes, provides:

> "That all property in this State, real and personal, not expressly exempt therefrom, shall be subject to taxation in the manner prescribed in this act."

It is not claimed that these lands are exempt from taxation under or by virtue of any law or regulation of the State of Kansas. If they are relieved from the ordinary burdens of government, it is because they are not included within the territorial limits or jurisdiction of the State of Kansas, by the consent of the Indian tribe of which plaintiff in error is a member. This consent is, we think,

clearly manifest, as well from the condition, desires and necessities of the tribe, and particularly of the so-called half-bloods, as well as by the express terms and conditions of the treaties by which these lands were allotted to plaintiff in error and to her vendors.

The Sac and Fox Indian reservation in Kansas, was selected in pursuance of the treaty between that tribe and the United States, concluded in 1842, (U. S. Stat. at Large, Indian Treaties, 596,) Art. 2 of which provides that the President "shall assign a tract of land suitable and convenient for Indian purposes, to the Sacs and Foxes for a permanent and perpetual residence for them and their descendents" etc. It is claimed by council for plaintiffs in error that "this broad shield, thus thrown over this entire reserve, still protects the property in dispute, which is a part of it, in the hands of Mrs. Pennock, one of the descendents of this tribe." The answer to this argument is found in the sub-equent treaties between this tribe and the United States. These Indians have now another "permanent and perpetual residence for them and their descendents," and which is likely to remain perpetual until the government, by treaty stipulations or otherwise, terminates its permanancy. The same treaty making power which established the Kansas reservation, and guaranteed to the tribe the rights therein enumerated, subsequently abolished that, and planted the tribe upon its present reservation. The treaty between the United States and the confederated tribe of Sacs and Foxes of the Mississippi, ratified July 9th, 1860, (15 U. S. Stat. at Large, 467,) is the first with plaintiff's tribe that throws any light upon

the subject in controversy. The tribal reservation was then surrounded by the habitations and settlements of the white man. Progress had been made towards civilization, and the Indians comprising the tribe proper, had accepted many of the customs and habits of their white neighbors. A portion of the tribe, while maintaining some sort of tribal relations with the occupants of this reservation, were Indians merely in name. Some had long before that time inter-married among the whites, and had become incorporated into and formed a part of the neighboring white settlements. Others, often the issue of these marriages and inter-marriages, retained but little Indian blood and less of Indian customs and habits. All were more or less anxious to imitate the white man in the matter of providing houses, and in promoting the habits of thrift and enterprise by which homes and the comforts of life are possible. Subsistence from the chase was no longer possible, to even the most uncivilized among them; and for agricultural pursuits, the tribe possessed more land than could be utilized, and hence the provision in Art. 1:

> "The Sacs and Foxes of the Mississippi, having now more lands than are necessary for their occupancy and use, and being anxious of promoting habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the individual members of the tribe," etc.

No reference was here had, however, to the plaintiff

in error. She was included in another class, for which a different provision was to be made. Out of this diminished reservation were to be selected and assigned to each member of the confederated tribe proper, and without distinction of age or sex, a tract of eighty acres of land. Upon this diminished reservation, whether upon lands thus to be assigned to the individual members of the tribe, or otherwise, the laws passed by Congress regulating trade and commerce with the Indian tribes were to be in full force and effect. The whole of the lands embraced within the boundaries of this new reservation, whether assigned in severally or not—and only this—was to constitute and be known as "The Reservation of the Sacs and Foxes of the Mississippi." (Art. 2.)

It is further provided with reference to the allotments within the reservation, (Art. 2.)

> "That said tracts shall not be alienated in "fee, leased, or otherwise disposed of, except to "the United States, or to the members of the Sac "and Fox tribe, and under such rules and regula- "tions as may be prescribed by the Secretary of "the Interior. And said tracts shall be exempt "from taxation, levy, sale or forfeiture, until oth- "erwise provided by Congress."

For the purpose of further aiding and encouraging the members of the tribe embraced within the article of the treaty referred to, and of providing them with suitable buildings, the remainder of the old reservation was to be sold as provided in Article 4. There can be no ques-

tion about the intention of the parties to this treaty so far as the tribe itself, as an organization, was concerned, or of the individual members remaining within this reservation, and who, subsequently, followed the fortunes of the tribe to the Indian Territory.

It is clear that as to this new reservation, and the allotments within its boundaries, the tribe did not consent to, nor was it the object and purpose of the treaty, to place any portion of its lands or its occupants within the jurisdiction of the Kansas laws. Nor has the State assumed any such jurisdiction. No attempt was ever made to tax these lands, nor plaintiff's lands, so long as they were burdened with a single restriction, or so long as either the tribe or the United States retained a particle of control over them. The differences in education, habits, ambitions and necessities, as well as the caste founded upon blood and the conflicts which such caste produces, had already divided the tribe into two distinct classes. The one class comprised the ignorant Indians, deserving and receiving the protection of the government from inexperience, and the overreaching white man, while as to the other class, like protection with similar restraints would amount to an absolute burden. The members of the tribe needing the care and guardianship of the government were fully protected by the provisions of this treaty. Their allotted lands were guarded from the speculative proclivities and the intrusion of the white man, while other lands were to be sold and the proceeds used in providing them with houses, and the "necessary aid and facilities for commencing agricultural pursuits under favorable circumstances." But

the plaintiff in error was not of this class. She was the wife of a man not less able, shrewd and business-like than the sharp and cunning white man who has succeeded him in the confidence and affection, the wealth and the beauty of this educated and accomplished allottee. Her lands were not included within the boundaries of the reservation retained by the tribe, nor were they burdened with the restrictions and safeguards thrown about the designated allotments within that reservation. It is plain from the whole tenor of this and the subsequent treaty that she and her half-blood brothers and sisters, together with such of her whole blood relations, who had inter-married with white men and whose examples in this respect she has since followed, were not contemplated or considered as within the so-called Indian protections of the treaty; nor were the lands donated to them, embraced within, or to constitute an Indian reservation in any such sense as the territory retained by and for the use of the tribe. They were considered worthy of some recognition at the hands of the tribe in which they still hold at least a nominal membership. This recognition took the practical shape of the donation of a farm—farms to be absolutely their own, and burdened with the single restriction that alienation could only be had to members of the tribe, or to the United States. Of the lands ceded to the government in trust, and in the distribution and enjoyment of the proceeds and profits thereof, the plaintiff in error and her grantors were to have no parcel or interest. (Art. 10.) They occupied a different plane in life, lived differently, and had no need of the protection so generously provided

for their less civilized and possibly less industrious brethren of the full-blood. They had built houses, tilled the soil and made improvements which were, as far as possible, to be included within the lands thus donated to them. Plaintiff in error was included in the provisions of Art. 10:

> "The Sacs and Foxes of the Mississippi, being anxious to make some suitable provision for their mixed and half-bloods, and such of their women (whole bloods), who have inter-married with white men, it is agreed that there shall be assigned to the mixed and half-bloods of their tribe, and to such whole blood females as have inter-married with white men at the date of this agreement, three hundred and twenty acres each; the location and allotments of said lands to be made out of that portion relinquished to the United States in trust, provided the mixed or half-bloods and such females of their tribe as have inter-married with white men, desire to do so. * * * * The lands granted by this article shall remain inalienable except to the United States or members of the tribe, nor shall the mixed or half-bloods, or such females as have inter-married with white men, participate in the proceeds of the lands herein ceded."

This, then, was the "suitable provision," the testestimonial of friendship and good will that the tribe thought proper to make for their fairer skinned rela-

tives, that each was to have a farm outside the tribal reservation and away from those still needing the special care and protection of the government. There is here no exemption "from taxation, levy, sale or forfeiture, until otherwise provided by Congress," as provided in the case of the lands allotted to the full-bloods. The single restriction remained that these half-breed lands were to remain "inalienable except to the United States or members of the tribe." This single restriction in the grant to Mrs. Pennock and her vendors may sufficiently evidence an intention by the parties to the treaty to exclude these lands from the jurisdiction of the State of Kansas. At least this is the view taken by the State and County authorities, and no steps were taken towards assuming jurisdiction, until that restriction and every interest of the tribe and of the government had been wholly removed.

In February, 1867, the Sacs and Foxes concluded another treaty, and the last in any manner affecting the lands in controversy, with the United States. This treaty was not fully consummated and proclaimed until October 14th, 1868, (U. S. Stat. at Large, 465). By it, this tribe of Indians ceded to the government all the lands in the State of Kansas to which they had any claim, and agreed to remove to the Indian Territory, their present home. There is but a single reference in this treaty to plaintiff in error, or to the lands allotted under the 10th Article of the former treaty. Art. 17 of the latter treaty is as follows:

"It is hereby provided that the half-breeds

"and full-bloods of the tribe who were entitled to "selections of land under the Sac and Fox treaty, "ratified July 9th, 1860, and which selections "have been approved by the Secretary of the In- "terior, shall be entitled to patents in fee-simple "for the lands heretofore selected, according to "the schedules annexed to this treaty: Provided, "that when such selections have been made, and "the allottees have sold their lands for a valuable "consideration, not less than one dollar and twen- "ty-five cents per acre, the Secretary of the Inte- "terior shall, upon full proof being made, cause "patents to issue to the purchasers or their as- "signees."

By virtue of this Article the lands in controversy were patented to Mrs. Pennock, and to her grantors as evidenced by the patents comprised in exhibits A. B. C. and D. respectively, attached to and made a part of the plaintiff's petition in the Franklin County District Court (Rec. 4-10.) The separation contemplated in the treaty of 1860 was now complete. The tribe abandoning Kansas, sought a new home further removed from the white man Mrs. Pennock, preferring the associations and customs of the latter, remained in Kansas where she has ever since resided, and where, with her white husband, citizens of the State and of the United States, they now live. She had renounced all claim to share in the proceeds of the Kansas reservation by electing to take the other "suitable provision" granted her under the treaty of 1860 To the tribe, and through it, to the general government, she no longer looked to the management,

control or protection of these lands. She might now sell them and follow the tribe, or remain upon to cultivate and develop them as she has done. The tribe may maintain its organization, Mrs. Pennock may still claim membership in the tribe; she may even receive annuities from other tribal funds, but these lands, and the State jurisdiction over them, are in no way effected thereby. In the language of this court in the case of *Doe et. al. vs. Wilson:* "The treaty itself converted the reserved sections into individual property. The Indians, as a nation, reserved no interest in the territory ceded; but as a part of the consideration for the cession, certain individuals of the nation had conferred on them portions of the land, to which the United States title was either added or promised to be added." (23 How. 457.) It will be observed that in neither of the treaties referred to is Mrs. Pennock designated as a "member of the tribe." Art. 2 of the treaty of 1860, provides, as we have seen, that "there shall be assigned to *each member* of said confederated tribe, without distinction of age or sex, a tract," etc. Mrs. Pennock and her grantors were not included within these provisions. The only reference made to them is in Art. 10 of that treaty. Their formal tribal relation had not been severed, but they had so far ceased to be Indians, as to assume the airs and take upon themselves the duties and responsibilities of the white man. No treaty could have eliminated the Indian blood from their veins, and none was wanted divorcing the full-blood women from their fair skinned husbands, though the latter could not lawfully visit their wife's relations on the reservation,

"without the written permission of the superintendent of the central superintendency, or the agent of the tribe."

The only badge or condition attached to Mrs. Pennock's lands giving them the color of an Indian reservation, and holding in obeyance the jurisdiction of the State of Kansas, was the partial restriction upon alienation contained in the treaty of 1860. But for that restriction, she would have taken the lands allotted to her just as she now holds them—by title in fee-simple absolute. When that restriction was abrogated she bore to these lands the same relation as though that restriction had never attached. They were, by the treaty of 1868, divested of every semblance, and rid of every shadow of an Indian reservation. They formed no part of, and bore no sort of relation to any such reservation.

But it is claimed by council for plaintiff in error, that article 18 of the treaty of 1868, confirms and perpetuates the restriction upon alienation, at least so far as to require the consent of the Secretary of the Interior to effect a sale. Article 18, it is claimed, limits and controls Article 17. This argument is hinged mainly upon the relative *position* the former article occupies in the treaty, and the supposed protection required by women of the full-blood, who had inter-married with white men, —women "whose experience in life had consisted of grinding corn and rearing young barbarians." However complimentary the latter reason assigned, may be to white citizens of Kansas, who have chosen Indian companions for wives, or to their client, Mrs. Pennock, the issue of

such a marriage, or whatever the position of the article in the treaty, the plain unambiguous language there used must, we suggest, govern in its construction. These lands were assigned by the treaty, as we have seen, of 1860. Plaintiff in error then became "*entitled to*" her selection. The selection was was made as provided, and duly approved by the Secretary of the Interior. Now, Article 17 of the treaty of 1868, declares that the selection thus made should be patented in fee-simple. A provision is then attached for the issuance of patents to the purchaser in certain cases where the price paid had "not been less than $1.25 per acre," under the former treaty. (See amendment to Art. 17.) Then follows Article 18, in which the restriction upon alienation requiring the consent of the Secretary of the Interior, is attached to lands assigned under this (1868) treaty. The lands in controversy were clearly *not assigned in this* treaty, and the restriction clause of Article 18 has, therefore, no reference or application to them. This is the construction put upon the treaty by the Supreme Court of Kansas. (Rec. 16.) It is also the construction adopted by the political department of the general government, as appears from a communication from the Interior Department of which the following is a copy:

"DEPARTMENT OF THE INTERIOR,
"OFFICE OF INDIAN AFFAIRS,
"WASHINGTON, D. C., Oct. 3d, 1873.

"GENTLEMEN:—I am in receipt, by reference "from the Hon. Secretary of the Interior, of your "letter of the 6th of August last, submitting a

"question arising from Article 17, of the treaty "with the Sac and Fox Indians, approved 29th "July, 1868. [Stat. at Large, Vol. 15, p. 498.]

"In reply you are advised that the said 17th "Article authorizes patents in fee-simple to be is- "sued to the reservees, and they have been so is- "sued, and the patentees have the right to convey "these lands without restriction.

"Very respectfully,

"Your obt. servant,

[Signed,] "H. R. CLUM,

"Acting Commissioner.

"Messrs W. H. Maxwell & Co.,

"Ottawa, Kansas."

(Rec. Int. Dept. letter press copy.)

Certain lands, to be selected out of the reservation, were assigned under Article 11 of the new treaty, provided "That the parties herein named shall pay to the Secretary of the Interior, within three months from the ratification of this treaty the sum of one dollar per acre for said lands, the avails of which shall be used in the same manner as the other funds arising from the sale of their lands." (Art. 11, as amended.) These allottees are not referred to as half-bloods, or as full-blood women who had inter-married with white men. They doubtless comprised all shades of descent, and it is a significant fact that the proceeds of these lands were to be distributed in the same manner as the other funds arising from the disposition of their reservation, and in which Mrs. Pennock and those to whom lands had been

donated in a former treaty could not share. Other lands were to be assigned to Black, for protecting houses and timber; to Powers, government interpreter, and to John K Rankin, the licensed trader. The chiefs and head men were also permitted to sell certain lands, with the consent of the Secretary of the Interior, etc. (Amendment to Art. 20.) But all these lands required the consent of the Secretary of the Interior to complete a sale. There were probably many reasons for this; no one of which, perhaps, being alike applicable in all cases. The reason assigned by counsel would probably not apply to John K. Rankin, the licensed trader; to the interpreter, or to their client, Mrs. Pennock. A sufficient reason might be suggested by the fact that these lands, with one or two exceptions, were not *located*. Something after the treaty remained to be done—selections were to be made, boundaries defined, improvements appraised, money paid, etc. But whatever the reason or reasons, it is enough for us to know that the restriction upon alienation contained in the treaty of 1860 was effectually removed by a treaty that subsequently granted lands out of another reservation, with such restrictions. And this, if our conclusions are correct, disposes of counsel's first proposition.

We come now to the only other proposition urged against the taxation of the lands in controversy, viz: that the plaintiff is in tribal relationship with an organized tribe of Indians, and that the title to her lands is derived through the treaty making power of her tribe and the United States. We have already shown, we

think, that Mrs. Pennock does not hold these lands in any sort of Indian capacity, but as a private person, the donee of an Indian tribe. Her tribe said in substance: We want Mrs. Pennock to own in her own individual right a certain tract of land heretofore comprised within our reservation. To this end, we relinquish our claim to them to the United States, upon conditions that, among other things, the United States relinquishes its title thereto, and conveys said lands to the object of our regard. The proposition is accepted and the title thereupon accordingly vested in Mrs. Pennock. Now how does her tribal or political relationship affect these lands? These same Indians, in their treaty of 1842, grateful for the kind offices of their former friend and agent, General Street, provided that the General's widow should have a section of land to include the graves of her husband and a former Indian chief. Did this work an exemption of those lands from taxation? Is it the nationality of the donor or donee, in such cases, that works the charm of exemption? Is there the same sanctity about an Indian *gift*, as counsel claim for an Indian *purchase*,—that the sweets of taxation may not settle upon it? Or does the consideration affect the taxability of the property? The consideration in Mrs. Pennock's case, was "the suitable provision" the tribe was desirous of making for her. In Mrs. Street's, the grateful memory of her husband. To another, valuable service; and to the United States, money and new hunting grounds. So that most of our homes in Kansas are upon lands to which the Indian rights have been in some such way extinguished. And this brings us back to the inquiry with which we began this argu-

ment, viz: Have the Sac and Fox Indians, by any act or treaty, signified their assent that the lands in question should become a part of the jurisdictional territory of the State of Kansas. We affirm that this assent is as clear in the case of Mrs. Pennock's lands, as the lands of any white man within the limits of the old Sac and Fox reservation, holding under a patent from the United States. The Indians and the government are alike concluded. The State can only obtain jurisdiction by treaty between these two powers, or by the consent of the Indians. The treaty power is exhausted as to these lands, because neither power possesses any interest in them. The tribe might "signify their assent to the President of the United States to be included within said State," as provided in the act admitting Kansas into the Union and thus, it is claimed, give the State jurisdiction. But the tribe has already given such consent, by donating these lands to a private person. The consent of the Sacs and Foxes now given, could no more affect those lands or the jurisdictional rights of the State of Kansas over them in the hands of the present holder under her patent, than the consent of the Modocs, or of any other tribe of Indians could affect them. It is the individual; the private owner who now controls and holds these lands—holds them the same as any other private person would hold them, and with no broader rights or privileges than any other person, of whatever nationality, color or condition holding under an absolute fee-simple title from the general government and without a single obstruction, reservation, exception, or right, from Indian or white, tribe or nation.

This case differs very materially from the case of the Kansas Indians, 5 Wall. 737. Here, there is no restriction in the patents that had not been removed more than two years prior to the assessment complained of; no question of the presence and control in Kansas of the tribal organization, or the obligations of government to protect Indians in their right to property to which the Indian claim had not been wholly extinguished; or of the other provisions, restrictions and treaty guarantees, which in the case of the Miama's, Shawnees, and Weas, were construed by this court as evincing a purpose upon the part of the Indian to shield himself from the burdens which a complete and unrestrained proprietorship in the soil, exempt from Indian immunities, imposes; and of the government in making good its obligations of protection In both the treaty of 1860 and 1868 clearly appears the same care in protecting the ignorant Sac and Fox Indian, as in the case of the Miamis, Shawnees, and Weas. The latter occupied substantially the same relation to their respective tribes, to the State of Kansas, and to the government, as did the Sacs and Foxes as a tribe and upon their reservation, with their allotments, too, in severalty. In both cases there was a manifest intention upon the part of the Indian to invoke and of the government to grant all the protection necessary to secure them in the enjoyment of their reservation and lands; and hence the restrictions and guarantees,—restrictions, the total abolition of which, when made, indicates most clearly a purpose upon the part of the tribe and the government to place the lands in controversy upon an entirely different basis.

II.

The other branch of this case, relates to only so much of the lands in controversy as the plaintiff in error obtained by purchase, as distinguished from those donated to her. The Goodells and Kish Kah-Qua, her grantors, took their lands the same as Mrs. Pennock hers. We have maintained, and the Kansas Supreme Court have asserted, that these lands are all taxable in the hands of the respective donees But if this court shall hold that there is an exception in either case, then it must hold, we think, that the right of exemption is personal to the allottee. This position has not been controverted by counsel for plaintiff's in error.

There is no exemption attaching to the land, qualifying the estate, and inuring to the benefit of all subsequent holders. The United States have never claimed the right, or attempted to exercise the power of exempting lands from taxation after the government had disposed of them to individuals and parted with all control over them. And certainly the Sac and Fox Indians had no such power. So long as the lands remain Indian lands, or so long as the government retains an interest in, or control over them, the State is prohibited from exercising the taxing power in relation to them. But the moment the title passes out of the government and is vested in indi-

viduals, and especially when these individuals, in turn, vest the title by ordinary purchase and sales in other individuals, the lands become subject to all the laws of the jurisdiction where they are located. That the parties to the treaty contemplated attaching an exemption to the donated lands, while in the hands of the owners, and after both the Indian claims and the government right had been extinguished, seems hardly possible. "But," to use the language of Justice Brewer in delivering the opinion of the court in *Commissioners of Miami Co., vs. Breckenridge*, 'that the government should contemplate attaching this as a permanent exemption to the land, running with it long after it should pass out of the hands of the Indians who alone were sought to be protected, and placing a large body of land within the borders of Kansas, owned by her citizens, yet beyond the reach of her laws, is hard to believe" (12 Kans. 114; see also *Krause vs. Means*, 12 Ks. 114.) Again, adopting the language of Chief Justice Dixon in an elaborate opinion of the supreme court of Wisconsin wherein the identical question here presented is discussed: "If it be not a conceded proposition, it should be, that the restriction of alienation without the permission of the President, was *personal to the patentee*." (*Farrington vs. Wilson et. als.* 29 Wis., 383.) But it will hardly be contended that the lands assigned to Samuel Black, (for example,) in the treaty of 1868, and which have been since sold to a white man with the approval of the Secretary of the Interior, are exempt from State and County taxation. This would be of a piece with the suggestion of the learned counsel for plaintiff in er-

ror "that property which an Indian acquires by purchase or traffic from citizens of the State, becomes untaxable as soon as the Indian becomes the owner of it,' —the absurdity of which is apparant upon its face.

But the lands owned by Mrs. Pennock, outside her donation, were purchased while the restriction upon alienation remained in force. This restriction only permitted sales among a class, but was of the same nature, of course, as though it had been placed upon sales to all parties. Was the restriction any the less *personal* to the allottee because it applied only to a certain class of purchasers? And if the ordinary treaty stipulation upon alienation be personal to the allottee, is not the corresponding privilege of selling to a particular class of persons, also personal to such allottee? If the patents to Mrs. Pennock's grantors had contained some such clause as were contained in the cases last referred to.—a clause common in the Indian treaties of Kansas,—and the consent of the President or other officer of the United States had been required and procured, then those lands, in the hands of the allottee's grantee would have been taxable; provided, of course, there be no such exemption as is claimed by counsel, for an Indian as a speculator. But in the case at bar there was no restriction affecting those sales to Mrs. Pennock, and hence no consent was required from any third person. And why are not these lands subject to taxation in the hands of a grantee by purchase and sale, where no consent of a third part is required, as completely as though that consent had been required and received? At the date of Mrs. Pennock's respective purchases, the white man

could not compete in the market for the purchase of these lands then in the hands of the respective donees. Is she now to be specially protected from the ordinary burdens of the government under which she lives, because she was then in the enjoyment of a comparative monopoly? Was it the intention of the parties to the treaty, and is it the policy of the government to forever exempt from taxation all the real property enumerated in Article 10 of the treaty of 1860, that might be secured by a shrewd and grasping half-blood Indian, or by a not less scheming white man who had already secured for himself a wife from among the full-bloods? No amount of liberality nor the application of the most enlarged rules for the construction of Indian negotiations can torture this treaty into any such meaning. An Indian with white blood enough in his veins, and who had so far adopted the habits of thrift and economy of the white race to be able to purchase and pay for lands, might well be presumed to possess the ability to pay the taxes on them. There is no law or regulation that we are aware of, prohibiting Indians from speculating in lands. Nor do we know of any law that affords them any other or greater protection that other persons in dealing in lands in no way incumbered with Indian immunities. Says Justice Valentine in *Rubideaux vs. Vallie*, 12 Ks., 28: "We know of no law of the United States, or of this State, that authorizes an Indian to purchase land in Kansas, and then refuses to pay for the same. Neither do we know of any law that prohibits the State of Kansas from taking jurisdiction of the persons and property of Indians found within the territo-

rial boundaries of the State, except while such Indians or property are actually situated on a reserve excluded from the jurisdiction of Kansas; and there are no such laws. Every man, resident or non-resident, citizen, alien or foreigner, if he comes within the jurisdiction of Kansas is subject to her laws, and if he contracts debts is required to pay them." The government no more restricts the Indian from dealing in lands than it controls him in the purchase of ponies, or the swapping of moccasins. Land is a Kansas commodity in which there is no class monopoly. The object of the exemption here sought, if there was any, was to protect the allottee; not the speculator, whether Indian or white. And when the object of exemption ceased, the exemption itself ceased.

There is no provision made in the treaty of 1830 for the issuance of patents to the allottees under Article 10. The legal title accordingly remained in the government until patents were issued under Article 17 of the treaty of 1868. Sales made under the former treaty, when approved by the Secretary of the Interior, were patented directly to the purchasers But this fact affects nothing in the case at bar. The personal privilege or protection of Mrs. Pennock's grantors, if they had any, was as effectually eliminated by their sale, and their grantee holds by purchase and with like effect, as though her grantors had been formerly invested with title by patents.

We therefore

CONCLUDE:

1. The patentees obtained and held title to the lands in question within the territorial limits of the State of Kansas, as private persons, without limitation or restriction.

2. As private persons, so holding, these lands are not exempt from taxation.

3. The Indian tribe and the United States, having by treaty stipulation and government patent parted with all control over these lands, they passed, in the hands of the individual, under the jurisdiction of the State of Kansas, and are therefore taxable.

AND

4. If there was a privilege of exemption, it was personal to the allottee and did not qualify the estate in the lands, or inure to the benefit of the purchaser.

5. Plaintiff in error, Mrs. Pennock, is a purchaser, and the lands to which she thus claims title are taxable.

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